Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ARIS ETHERLY,

Petitioner,

v.

RANDY DAVIS, WARDEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Aris Etherly was tried and convicted of first degree murder. He was fifteen years old at the time of his arrest and interrogation by police. On direct appeal, the Illinois Appellate Court ruled that inculpatory statements that Aris made to police were voluntary. This Petition arises from subsequent federal habeas corpus proceedings.

The Questions Presented are:

1. Whether the presence of a youth officer during part of the interrogation of a juvenile may weigh in favor of finding that the juvenile's statements to police were voluntary, where the youth officer was passive and did not communicate with the juvenile.

2. Whether a court should apply a higher level of scrutiny, and attach greater significance to evidence of coercive police tactics, when evaluating the voluntariness of a confession obtained from a fifteen-year-old as opposed to an adult.

3. Whether a federal habeas corpus petitioner may show that a state-court factual determination is unreasonable in light of the evidence presented during the state-court proceedings, or is additionally required to present clear and convincing evidence that the finding is incorrect, as to which there is a split in the Courts of Appeals.

PARTIES TO THE PROCEEDING

The parties are petitioner Aris Etherly and respondent Randy Davis, the current Warden of the Pinckneyville Correctional Center in Illinois. The parties appearing below were Aris Etherly and Gregory Schwartz, the former Warden of the Pinckneyville Correctional Center.

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Petitioner Aris Etherly respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Order of the Illinois Appellate Court affirming Aris' conviction on direct appeal (App. 66a) is unreported. The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois granting Aris' federal habeas corpus petition (App. 39a) is reported at 649 F. Supp. 2d 892. The opinion of the United States Court of Appeals for the Seventh Circuit reversing the district court, as amended on denial of rehearing and suggestion for rehearing en banc (App. 1a) is reported at 619 F.3d 654.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered judgment on August 25, 2010. (App. 20a.) A timely petition for rehearing with suggestion of en banc rehearing was denied on October 15, 2010. (App. 80a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 2254 provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any

claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

***

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

A. Overview.

Then-fifteen-year-old Aris Etherly was arrested on July 17, 1995 in connection with the shooting death of Jeremy Rush. (App. 67a.) Police obtained inculpatory statements from Aris and he was convicted of first degree murder. (App. 66a.) The Illinois Appellate Court affirmed. (App. 67a.) Aris timely filed for a writ of habeas corpus.

On August 28, 2009, the district court ruled that Aris' statements to police were obtained in violation of the Constitution and granted the petition. (App. 39-40a.) On August 25, 2010, the Seventh Circuit reversed. (App. 20-21a.) Aris timely filed a petition for rehearing with suggestion of rehearing en banc. On October 15, 2010, that petition was denied (App. 80-82a), but the Seventh Circuit modified its initial opinion and issued an amended opinion. (App. 1a.)

B. Aris' Arrest and Involuntary Statements to Police.

Aris was arrested at his family home at 6 a.m. (App. 67a; JA 90, 137, 151-52.[1]) He had never been arrested before and had no experience with the

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[1] Citations to "JA __" are to the Joint Stipulated Appendix in the record on appeal, which consists primarily of portions of the state court record.

We note that the Seventh Circuit's recitation of the facts does not appear to be consistent with the state court record. For example, the opinion states that Aris "got into a car and drove around looking to shoot and kill members of a rival gang." (App. 2a.) We have been unable to locate any such factual finding in the state court record.

police. (App. 74a.) At least five officers, including Detectives Theodore Golab, Robert Flood, and Cornelius Spencer, took part in the arrest. (JA 63-64.) They handcuffed Aris, put him in a police car, took him to the Area 2 station and left him alone in an interrogation room until 8 a.m. (App. 67a; JA 90, 137-38.)

At 8 a.m., Detective Spencer, accompanied by a youth officer, Frank DiGrazia, began to question Aris. (App. 67a; JA 138.) Spencer read Aris standard Miranda warnings from a preprinted police pamphlet. (JA 59-61.) DiGrazia did not explain any Miranda rights to Aris and did not ask Aris any questions. (JA 69-70.) As Spencer put it, DiGrazia "sat there just to watch." (JA 69, 268.) Spencer left after Aris denied any involvement in a shooting. (JA 71, 138.)

Sometime in the next two hours (according to the state courts' findings), a uniformed police officer – who has never been identified – took Aris alone into an Area 2 bathroom. (App. 67-68a; JA 138-39.) There, that officer told Aris he had "a moral obligation" to "let the officers know where the guns were" and to "tell the truth," and that it would "go better" for Aris in court if he helped police locate the weapons. (JA 62, 94, 137-38.) According to Spencer, Aris called out to him around 10 a.m., related what the officer said in the bathroom, and now wanted to show Spencer "where the weapons were." (JA 61-62, 138-39.) No youth officer (or anyone else) was present in the bathroom nor during this purported conversation between Spencer and Aris. (JA 271-72.)

Golab and Flood then interviewed Aris. (JA 80.) Again, no youth officer was in the room. (JA 80, 219.) That was a flat violation of police policy. (JA 220.) According to Golab, Aris said he now wanted to make a statement. (JA 93.) Neither Spencer nor Golab ever tried to find out the identity of the officer who had taken Aris to the bathroom and there obtained Aris' apparent willingness to cooperate. (JA 71-72, 94.)

Aris named an address. (JA 80.) The detectives took Aris to that location and found weapons, then brought him back to Area 2 to be interviewed by an Assistant State's Attorney. (JA 80-81.) This time, DiGrazia was present. But, as before, he did not speak. He "was just there." (JA 96, 221.) It is uncontested that at no point in the day did DiGrazia make any attempt to speak to Aris. (App. 3a.)

The interview revealed that Aris did not even know how to write his own name. (JA 98-99.) He declined an opportunity to handwrite his statement. (JA 82-83.) In a court-reported statement, Aris stated that a uniformed officer had "made a promise. Told me to get the guns." (JA 87.) Aris added a handwritten correction: "so the judge would know I helped them." (*Id.*) Aris spelled "judge" g-u-b-g-e, "would" w-o-l-e-d, and asked for help spelling "know", "helped" and "them". (JA 99, 300, 335.) When trying to sign several pages of the statement, Aris misspelled his own last name and did not cross the "T." (JA 98-99.)

C. Further Evidence of Aris' Lack of Intellectual Capabilities.

Uncontroverted testimony in the state court record established that Aris could not read, had been in special education classes since the second grade, had a tutor for each class in school, and was failing all his courses. (JA 105-08, 354.) A teacher from the juvenile detention facility who was trying to teach Aris phonics testified (again without contravention) that Aris was "completely illiterate" and could not even sound out the alphabet or remember which sound went with which letter. (JA 354.) After five months he was unable to get through the alphabet. (JA 354-55.)

More than a year after Aris' arrest, the trial court engaged a psychiatrist, Dr. Philip Pan, to determine Aris' ability to understand and waive his Miranda rights. (JA 146-49.) In his report, Dr. Pan diagnosed Aris with "borderline intellectual functioning." (JA 149; App. 70a.)

Despite that diagnosis, Dr. Pan also opined that Aris had understood his Miranda rights and (somehow) was able to waive them. (*Id.*) Dr. Pan's report is dated December 27, 1996 – nearly a year and a half after Aris' arrest and questioning by police. (JA 149.) Nevertheless, Dr. Pan evaluated Aris' intellectual functioning completely in the present tense, i.e., as of December 1996 (not as of July 17, 1995):

> I feel that Mr. Etherly *understands* that he *is* not required to talk to the police,

> that the legal system *will* act upon any information given to them, that he *is* entitled to have a lawyer present while he *is* questioned, and that if he *can't* afford a lawyer that he *will* be appointed a public defender who he *will* not have to pay for.

(*Id.* (emphasis added).)

D. The Illinois Appellate Court's Decision on Direct Appeal.

On direct appeal, the Illinois Appellate Court held that Aris' court-reported statement was voluntary. (App. 71-75a.) Purporting to apply a totality-of-the-circumstances test, the court noted that "consultation with a youth officer" is an appropriate factor to consider for juvenile confessions and that DiGrazia was supposed "to ensure that [Aris'] rights were protected." (App. 73a.) However, the court concluded that DiGrazia's totally passive presence weighed *in favor* of finding his statements voluntary because Aris "had an opportunity to confer with the youth officer and never requested to do so." (*Id.*) The court addressed the bathroom encounter solely by determining that the uniformed officer's comments did not constitute a "promise of leniency." (App. 73-74a.) The court stated that the only factors weighing against finding Aris' statements voluntary were his "age, lack of intellectual capacity and lack of criminal background." (App. 74a.) Ultimately, however, the court did *not* weigh Aris' lack of intellectual capacity against admission of his statements. Relying exclusively on Dr. Pan's report, the court concluded

that Aris "understood his rights" under Miranda, and that this purported understanding weighed in favor of admission. (App. 73-74a.)

E. Federal Habeas Proceedings.

On January 4, 2007, Aris timely filed *pro se* a petition for a writ of habeas corpus, raising six claims. The district court appointed counsel, who advocated for relief on three of those claims, including that Aris' statements to police were involuntary and obtained in violation of the Constitution.

On August 28, 2009, the district court granted Aris' petition. (App. 39-40a.) The district court concluded the Illinois Appellate Court's determination that Aris' statements to police were voluntary was an unreasonable application of the totality-of-the-circumstances test. (App. 59-60a.)

F. The Seventh Circuit's Decision Below.

The Seventh Circuit reversed, holding that under the standards of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), the decision of the Illinois Appellate Court was not objectively unreasonable. In its initial opinion dated August 25, 2010, the Seventh Circuit held, first, that the state court's conclusion that DiGrazia's mere presence weighed in favor of voluntariness was not unreasonable. (App. 35a.) Second, the Seventh Circuit held that the state court properly evaluated Aris' intellectual capacity. The court characterized the state court's conclusion that Aris had the intellectual capacity to understand and waive his

Miranda rights as a "factual finding" entitled to deference because Aris "did not present clear and convincing evidence to rebut the state court's reasonable reliance on [Dr. Pan's] report." (App. 36a.) Third, the Seventh Circuit held there was nothing coercive about the uniformed officer's statements to Aris in the bathroom because "merely telling somebody to tell the truth is not coercive." (App. 37a.)

In denying Aris' petition for rehearing, the Seventh Circuit modified its opinion. (App. 81-82a.) In the new opinion, the court now conceded that the state court "erred in finding that DiGrazia's presence militated in favor of voluntariness." (App. 16a.) However, the court characterized this as a "lone error" that was not "of such magnitude as to result in an unreasonable application" of federal law. (*Id.*) The court did not modify its conclusion that Aris had not "present[ed] clear and convincing evidence to rebut the state court's reasonable reliance on [Dr. Pan's] report." (App. 17a.)

REASONS FOR GRANTING THE PETITION

The Court should issue a writ of certiorari on the Questions Presented, for three reasons. First, in the decision below, the Seventh Circuit held that it is not an unreasonable application of this Court's precedent if a state court weighs the utterly passive presence of a youth officer in favor of the admission of statements obtained from a juvenile in a police interrogation, and further places on the juvenile the burden of requesting a concerned adult presence in

the interrogation. That holding stands in direct conflict with this Court's precedent, including *In re Gault*, 387 U.S. 1 (1967), *Gallegos v. Colorado*, 370 U.S. 49 (1962), and *Haley v. Ohio*, 332 U.S. 596 (1948). Those decisions refused to place such a burden on juveniles and emphasized the importance of a concerned adult presence in juvenile interrogations.

Second, the Seventh Circuit held that it was reasonable to find Aris' statements to police voluntary despite clear signs of police coercion in his interrogation. He made inculpatory statements to police after he was taken alone into a police station bathroom by an unidentified uniformed officer who told Aris he had a "moral obligation" to incriminate himself. Yet despite the intimidating setting, Aris' youth and inexperience with the police, and his diminished intellectual capacity, the state court did not even analyze whether this incident suggested coercion. The Seventh Circuit's endorsement of the state court's decision stands at odds with this Court's decisions in *Gault*, *Gallegos*, and *Haley*, which emphasized that the circumstances of juvenile interrogations must be carefully scrutinized for evidence of coercive tactics.

Third, this Court should resolve a circuit split concerning the standards by which a federal court in habeas corpus proceedings reviews state-court factual determinations. The Courts of Appeal are in conflict concerning whether a habeas petitioner challenging a state court's factual determination must establish that the determination was

"unreasonable" in light of evidence in the state-court record pursuant to 28 U.S.C. § 2254(d)(2), or whether the petitioner further is required to rebut a presumption that the determination was correct with "clear and convincing evidence" pursuant to 28 U.S.C. § 2254(e)(1).

Recently, in *Wood v. Allen*, 130 S. Ct. 841 (2010), this Court recognized the circuit split and granted certiorari on this question, but ultimately found that the merits of that case did not require its resolution. Here, the question is squarely presented and ripe for resolution. Aris showed below that the Illinois Appellate Court's determination that he had the intellectual capacity to understand his Miranda rights was unreasonable in light of overwhelming and unrebutted evidence to the contrary in the state court record. (Br. of Petitioner-Appellee at 28-31.) That is the standard followed in the Third and Ninth Circuits. The Seventh Circuit, however, rejected that argument on grounds that Aris had not presented clear and convincing evidence to rebut the state court's determination – thus following a contrary approach in the Eighth and Eleventh Circuits.

These three questions merit this Court's review. There is an extraordinary public interest in ensuring that police interrogations of juveniles comply with the United States Constitution. The decision below directly conflicts with and throws into doubt the continued viability of this Court's jurisprudence regarding the voluntariness of juvenile confessions. *See* S. Ct. R. 10(c). Equally important is the need to resolve the conflict among the Courts of Appeals

regarding the standards by which a federal court must review state-court factual determinations in habeas proceedings. *See* S. Ct. R. 10(a).

I. The Seventh Circuit's Decision Directly Challenges the Validity of This Court's Jurisprudence Concerning the Significance of a Concerned Adult Presence in Juvenile Confessions.

This Court has long "emphasized that admissions and confessions of juveniles require special caution" to ensure that the juvenile's statements to police were voluntarily made. *Gault*, 387 U.S. at 45; *accord Gallegos*, 370 U.S. at 54-55; *Haley*, 332 U.S. at 599. A critical factor in that inquiry is the presence or absence of a concerned adult during the juvenile's interrogation by police. *See Gallegos*, 370 U.S. at 54-55.

In *Haley*, this Court held that a confession obtained from a fifteen-year-old boy – Aris' age – violated due process where boy had been questioned for several hours without "friend or counsel" present. 332 U.S. at 600-01. The Court stressed the need for a friendly adult presence: "He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him." *Id.* at 600.

In *Gallegos*, the Court again emphasized this point, noting that the juvenile in that case was held in detention for several days and had been "cut off from contact with any lawyer or adult advisor." 370

U.S. at 54. Moreover, in squarely rejecting the State's argument that it was sufficient that the boy had been advised of his rights but declined to ask for a lawyer or for his parents, the Court refused to place the burden on juveniles to request that a friendly adult be present. *Id.* The Court explained that a boy of that age, "no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police." *Id.* Such a boy "is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded" and "is unable to know how to protest his own interests or how to get the benefits of his constitutional rights." *Id.* Without advice from a "lawyer or an adult relative or friend," a juvenile has "no way of knowing . . . the consequences of his confession" and "would not be able to know, let alone assert, such constitutional rights as he ha[s]." *Id.* Allowing a juvenile's confession to stand in such circumstances "would, in effect, be to treat him as if he had no constitutional rights." *Id.* at 55.

This Court has not yet addressed the significance of a state-supplied youth officer in this analysis. However, lower courts, including in the Seventh Circuit, have squarely held that a youth officer must *not* be considered a sufficient adult presence. *Gilbert v. Merchant*, 488 F.3d 780, 792 n.1 (7th Cir. 2007); *A.M. v. Butler*, 360 F.3d 787, 801 (7th Cir. 2004). Those courts have further held that the presence of a passive youth officer who takes no steps on a juvenile's behalf *cannot* weigh in favor of voluntariness. *Id.*; *accord Ruvalcaba v. Chandler*, 416

F.3d 555, 561 n.1 (7th Cir. 2005). As the Seventh Circuit put it in a prior case (that it ignored in this one), the presence of a youth officer who "provided about as much assistance . . . as a potted plant" – like DiGrazia – is "meaningless." *Hardaway v. Young*, 302 F.3d 757, 765 (7th Cir. 2002).[2]

The Illinois Appellate Court's decision in this case – now endorsed by the Seventh Circuit – flatly contradicts the above precedent. The state court held that DiGrazia's passive presence should weigh in *favor* of a finding of voluntariness because Aris "had an opportunity to confer with the youth officer and never requested to do so." (App. 73a.) Thus, the state appellate court actually faulted Aris for not affirmatively seeking help from DiGrazia – as if fifteen-year-old Aris, who had never been arrested before, was somehow supposed to know the function of a state-supplied youth officer, when neither DiGrazia nor anyone else apparently said a single word to Aris about DiGrazia's role. Placing such a burden on a juvenile makes no sense, squarely contradicts this Court's decision in *Gallegos*, and further turns the rationale of *Haley*, *Gault*, and

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[2] In *Fare v. Michael C.*, 442 U.S. 707, 726-27 (1979), the Court found statements made by a 16 1/2-year-old juvenile voluntary despite the absence of a concerned adult presence. In that case, however, every other factor weighed in favor of admission: the juvenile had "considerable experience with the police," including "several arrests"; he had served time in boot camp; he was under the full-time supervision of a probation officer; it was undisputed that he understood his Miranda rights; and there was no "trickery or deceit" by police. *Id.* Nor did the state court in *Fare* hold the lack of a concerned adult presence in *favor* of admission, as the Illinois Appellate Court did here.

Gallegos – all of which stressed the importance of a "friendly adult" – squarely on its head.

Significantly, the Seventh Circuit's initial opinion in this case found little fault with this approach. The court did not even cite its own precedent regarding youth officers. Instead, the court simply concluded that because a youth officer's presence "is more than what is required by law," it was not unreasonable for the state court to hold that DiGrazia's utterly passive presence weighed in favor of finding Aris' statements voluntary. (App. 35a.)

However, after Aris filed a petition for rehearing that noted, *inter alia*, that the Seventh Circuit was endorsing an approach that could not be squared with precedent including *Gallegos* and *Haley*, the Seventh Circuit modified its opinion. (App. 81-82a.) The amended opinion concedes that the state court "erred" in weighing DiGrazia's presence in favor of finding Aris' statements voluntary. (App. 16a.) Yet, remarkably, the court held that this error of constitutional law did not "result in an unreasonable application of Supreme Court precedent under AEDPA." *(Id.)*

The opinion below fails to sufficiently explain how the state court could have "erred" in applying Supreme Court precedent, yet somehow did not "unreasonably apply" that precedent. The court's only explanation was that it was a "lone error" of insufficient "magnitude." (*Id.*) But that characterization cannot be sustained. This was not a matter of simply placing too much or too little weight on a particular factor in the voluntariness analysis.

Rather, the state court took a factor that should have weighed *against* admission of Aris' statements – heavily so, under *Haley* and *Gallegos* – and applied it in *favor* of admission. The balancing test for voluntariness was thus markedly skewed.

Moreover, the Seventh Circuit, like the Illinois Appellate Court, failed to recognize that DiGrazia *was not even present* during the key events of Aris' questioning. DiGrazia was nowhere to be found when the uniformed officer took Aris alone into the bathroom and advised Aris of his "moral obligation" to incriminate himself. Nor was he present when Aris told Spencer he was ready to tell him where the weapons were, or when Golab and Flood interrogated Aris and obtained from him the critical inculpatory statement (the address where weapons were found). In short, during the key moments when Aris inculpated himself in the face of police questioning, there was no "friendly adult" in the room at all – not an attorney, not a parent, and not even the poor substitute of a youth officer.

The Seventh Circuit's opinion thus directly conflicts with and throws into doubt the continued vitality of this Court's jurisprudence in juvenile-confession cases like *Gallegos* and *Haley*. It places the burden on a juvenile to somehow know the function of a state-supplied youth officer and affirmatively seek his help – even where the juvenile has no experience with the police and no idea what the officer's role is. That notion defies logic and cannot be squared with this Court's precedent, which

squarely holds that such a burden must *not* fall on the juvenile. *See Gallegos*, 370 U.S. at 54-55.

Further, the Seventh Circuit's downplaying of the state court's error poses a direct challenge to this Court's long-standing emphasis on the importance of the concerned-adult factor when evaluating juvenile confessions. If that factor is no longer to be viewed with the importance mandated under *Haley* and *Gallegos*, such a determination must come from this Court. But the rationale of those cases is sound. The Court should re-affirm their viability here, and reverse the Seventh Circuit's decision below.

II. The Seventh Circuit's Decision Conflicts with This Court's Jurisprudence Concerning the Level of Scrutiny Required for Determining the Voluntariness of Juvenile Confessions.

As noted, this Court has long emphasized that the circumstances of juvenile interrogations must receive a higher level of scrutiny than is applied in cases involving adults. In *Haley*, the Court explained that a fifteen-year-old boy is "a mere child – an easy victim of the law" who "cannot be judged by the more exacting standards of maturity." 332 U.S. at 599. The Court determined that "[a]ge 15 is a tender and difficult age for a boy[,]" and "[t]hat which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." *Id.* Accordingly, "special care in scrutinizing the record must be used." *Id.*; *see also Gault*, 387 U.S. at 55 (following *Haley* and instructing that where an admission was obtained from a juvenile, "the greatest care must be

taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.").

Under the Seventh Circuit's own jurisprudence, too, Aris' age should have been "a critical factor" that required the reviewing courts to "carefully . . . scrutinize police questioning tactics" used in his interrogation. *Hardaway*, 302 F.3d at 765; *see, e.g., A.M.*, 360 F.3d at 799-801; *Woods v. Clusen*, 794 F.2d 293, 297-98 (7th Cir. 1986).

The Illinois Appellate Court applied no such scrutiny in this case, and neither did the Seventh Circuit. Any such scrutiny would have revealed that Aris' statements to police were triggered by a coercive tactic designed to take advantage of his youth and inexperience.

According to the state court record, a uniformed police officer took fifteen-year-old Aris into a police station bathroom, alone, and told him it was his moral obligation to incriminate himself to the police. (JA 62, 94, 137-38; App. 68a.) It was only *after* this bathroom encounter that Aris – who up to that point had asserted his innocence – made his first inculpatory statements. (JA 80; App. 67-68a.)

Yet according to the Seventh Circuit (echoing the Illinois Appellate Court), Aris' "interaction" with the officer amounted to "merely telling somebody to tell the truth." (App. 18a.) The court clearly failed to grasp the significance of the incident.

It is axiomatic that a court applying a totality-of-the-circumstances test should look at the actual *circumstances*. A fifteen-year-old boy, who had no experience with the police and seriously impaired intellectual capabilities, was alone in a police station bathroom with a uniformed officer with a badge and a gun. Aris had been taken there only after denying, in the presence of the youth officer, involvement in a shooting. This was no mere restroom visit – it was a deliberate (and successful) attempt to persuade Aris to make inculpatory statements. The police action took advantage of a youthful suspect, inexperienced in the ways of police interrogation, and circumvented every constitutional safeguard this Court set forth in *Gault*, *Gallegos*, and *Haley*. This conduct should have raised a bright red flag for *any* reviewing court looking for indications of coercion.

Accordingly, dismissing the incident as "merely telling somebody to tell the truth" reflects a total abdication of a federal court's obligation to recognize and enforce settled constitutional safeguards. It is flatly inconsistent with the "special care in scrutinizing the record" that this Court has long demanded in cases involving juvenile confessions. *Haley*, 332 U.S. at 599; *accord Gault*, 387 U.S. at 45; *Gallegos*, 370 U.S. at 54-55.

III. This Court Should Resolve the Circuit Split Concerning the Standard of Review of State-Court Factual Determinations in Federal Habeas Proceedings.

A. This Case Presents a Compelling Opportunity to Resolve the Split.

Review of state-court factual determinations in federal habeas proceedings implicates two provisions of AEDPA. Under § 2254(d)(2), a federal court may grant habeas relief based on a claim adjudicated on the merits in a state-court proceeding where that adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Under § 2254(e)(1), "a determination of a factual issue made by a State court shall be presumed to be correct," and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

In *Wood v. Allen*, this Court granted certiorari "to address the relationship between §§ 2254(d)(2) and (e)(1)." 130 S. Ct. at 845. Specifically, the Court intended to review

> a question that has divided the Courts of Appeals: whether, in order to satisfy § 2254(d)(2), a petitioner must establish only that the state-court factual determination on which the decision was based was "unreasonable," or whether § 2254(e)(1) further requires a petitioner to rebut a presumption that

> the determination was correct with clear and convincing evidence.

Id. at 848.

As the Court noted, there is indeed a clear split in the Courts of Appeals on this issue. *Id.* n.1 (collecting cases). In the Third and Ninth Circuits, §§ 2254(d)(2) and (e)(1) serve separate and distinct functions. The Ninth Circuit has held that where a habeas petitioner challenges state-court factual findings "based entirely on the state record," a federal court reviews those findings for reasonableness under § 2254(d)(2), and § 2254(e)(1) comes into play only where the challenge is instead based on evidence extrinsic to the state court record that is introduced for the first time in federal court. *Taylor v. Maddox*, 366 F.3d 992, 999-1000 (9th Cir. 2004). Similarly, the Third Circuit has held that § 2254(e)(1) is limited to "individual factual determinations" in the record that are being challenged based on evidence typically developed at an evidentiary hearing pursuant to § 2254(e)(2). *Lambert v. Blackwell*, 387 F.3d 210, 235 (3d Cir. 2004).

A contrary approach that effectively merges the two provisions is reflected in decisions from the Seventh, Eighth, and Eleventh Circuits. Under that approach, the "clear and convincing" clause in § 2254(e(1) becomes a standard of proof that a petitioner must meet when trying to show an "unreasonable determination of the facts" under § 2254(d)(2). *See Collins v. Gaetz*, 612 F.3d 574, 586 n.5 (7th Cir. 2010) ("we will continue to review challenges to factual determinations under

§ 2254(d)(2)'s stringent unreasonable error standard, using § 2254(e)(1)'s clear and convincing evidence standard as 'the mechanism for proving unreasonableness.'") (citation omitted); *Freeman v. Attorney General*, 536 F.3d 1225, 1234 (11th Cir. 2008) ("Freeman has not demonstrated by clear and convincing evidence that the findings of the state court were unreasonable in light of the evidence presented during the [state] post-conviction evidentiary hearing"); *Trussell v. Bowersox*, 447 F.3d 588, 591 (8th Cir. 2006) (showing "'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding . . . requires clear and convincing evidence that the state court's presumptively correct factual finding lacks evidentiary support.")

Despite the Court's granting certiorari on this question in *Wood*, however, the Court ultimately declined to resolve it. 130 S. Ct. at 849. The factual finding at issue in that case was the state court's conclusion that the petitioner's counsel made a strategic decision rather than a negligent omission. The Court held that because the petitioner had not shown that this finding was an unreasonable determination of the facts in light of the evidence in the state court proceeding, there was no "need to decide whether that determination should be reviewed under the arguably more deferential standard set out in § 2254(e)(1)." *Id.*

Here, resolution of the question is appropriate. The Illinois Appellate Court concluded that based on the evidence before it, Aris was able to understand

his Miranda rights. (App. 73-74a.) In light of significant and unrebutted evidence in the state-court record demonstrating Aris' seriously diminished intellectual capacity, as discussed below, that conclusion was an "unreasonable determination of the facts" under § 2254(d)(2). The Seventh Circuit, however, applying § 2254(e)(1) instead, upheld that determination on the basis that Aris "did not present clear and convincing evidence to rebut" it. (App. 17a.)

In this case, therefore, the question of the relationship between §§ 2254(d)(2) and (e)(1) is squarely presented, and its resolution will make a decided difference. The state court translated its conclusion about Aris' purported ability to understand Miranda rights into a determination that Aris' intellectual capabilities did *not* weigh against exclusion of his statements. (App. 74a.) Combined with the state court's error in weighing the youth officer's ineffectual presence in favor of voluntariness, as noted in Part I *supra*, there would then be at least two crucial factors that the state court weighed in favor of the admission of Aris' statements, but which should have weighed *against* admission.

B. The Conclusion That Aris Was Able to Understand His Miranda Rights Was an Unreasonable Determination of the Facts.

The Illinois Appellate Court's analysis of Aris' intellectual capacity was threadbare, puzzling, and contradictory. The court initially stated that Aris' "lack of intellectual capacity" was a factor that "weigh[ed] against admission." (App. 74a.) But then

the court found that Aris (somehow) was intelligent enough to understand (and knowingly waive) his Miranda rights – and weighed that fact in *favor* of admission. (*Id.*) The court's conclusion that Aris had the requisite capacity to understand Miranda defies common sense and finds no support in the record.

The state court record contains overwhelming and unrebutted evidence of Aris' diminished intellectual capabilities. Aris was "completely illiterate," had been in special education since second grade, had a tutor in every class but was failing them all. (JA 105-08.) He could not comprehend basic phonics: it took him a month just to sound out vowels and attach those sounds to the proper letters, and after five months of working with a tutor he failed to get through the alphabet. (JA 354-55.)

Perhaps the most compelling evidence of Aris' capabilities lay in his attempts to sign and make handwritten corrections to his court-reported statement. Despite being in his first year of high school, Aris could not correctly spell or write his own last name. (JA 98-99.) He had to ask the Assistant State's Attorney how to write simple words, such as "know" and "them," and horribly misspelled words such as "would" and "judge." (JA 99, 300, 335.)

The Seventh Circuit and the Illinois Appellate dismissed these as mere "spelling errors." (App. 5a, 69a.) But being unable to write one's own name at the age of fifteen, despite years of special education and tutoring, is not a "spelling error." What it shows – and what the other, uncontroverted evidence confirms – is an alarming inability to learn even the

most basic concepts of communication and comprehension.

The state court ultimately disregarded all of this in favor of Dr. Pan's conclusion that Aris "understands" – present tense – his Miranda rights. That reliance on Dr. Pan's report was unreasonable, for several reasons. First, it was unreasonable for the court to adopt Dr. Pan's conclusion concerning Aris' capacity to understand Miranda rights, without also addressing the part of the report that diagnosed Aris with "borderline intellectual functioning."

Second, the state court relied on Dr. Pan's report to find that Aris could understand Miranda rights *at the time of his arrest and questioning by police*. (App 70a, 73-74a.) But Dr. Pan was stating his opinion as of December 27, 1996 – nearly a year and a half later. (JA 149.) That Dr. Pan was in fact opining as to Aris' capabilities as of a year and a half *after* his arrest is confirmed by the fact that with the exception of one sentence stating his ultimate conclusion, Dr. Pan's opinion of Aris' capabilities is written entirely in the present tense. (JA 149.)

Common sense dictates that a juvenile's capacity to understand and waive Miranda rights likely changes once he is a year and a half older (and has been incarcerated during that time with other persons who may be more knowledgeable with the workings of the criminal justice system). The state court's failure to recognize that common-sense fact is objectively unreasonable in and of itself. Perhaps even worse is that the state court apparently never even noticed the report was outdated.

Third, Aris' subpar intellectual functioning renders even more striking the coercive nature of the bathroom incident. It is plainly absurd to believe that in that moment, Aris really understood he had the constitutional right to refuse to talk to the police – or that they were not really going to help him if he incriminated himself.

In sum, the evidence in the state-court record provides no support for the proposition that Aris had the intellectual capacity to understand his Miranda rights at the time of his arrest. In fact, the evidence overwhelmingly demonstrates precisely the opposite. The state court's conclusion regarding Aris' intellectual capabilities was thus "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

C. The Seventh Circuit Applied the Wrong Standard.

Under § 2254(d)(2), Aris argued to the Seventh Circuit that the state court's determination of his intellectual capacity was unreasonable. (Br. of Petitioner-Appellee at 12-13, 28-31.) In response, the Seventh Circuit applied a confused and erroneous legal standard that perpetuates the circuit split discussed above.

The opinion below states that "[t]he state court's factual findings are entitled to deference, unless objectively unreasonable in light of the evidence presented in the state-court proceeding." (App. 16-17a.) However, the court cited § 2254(e)(1) for that

proposition, not § 2254(d)(2) – despite that the § 2254(d)(2) contains the language the court quoted. (*Id.*) Further, the court failed to conduct any analysis of whether the state court's finding was in fact "objectively unreasonable" in light of the record. Instead, the court rejected Aris' argument exclusively on grounds that he "*did not present clear and convincing evidence* to rebut the state court's reasonable reliance on [Dr. Pan's] report." (App. 17a (emphasis added).)

In short, the Seventh Circuit created an incoherent jumble of §§ 2254(d)(2) and (e)(1). Assuming for the sake of argument that the court meant to say that Aris was required to show the unreasonableness of the state court's determination under a "clear and convincing" burden of proof – similar to the approach taken by the Eighth and Eleventh Circuits, and in other Seventh Circuit cases as noted above – then that standard is wrong. It reflects an improper merger of two distinct statutory provisions that plainly serve two distinct functions. *Taylor*, 366 F.3d at 999-1000; *see Lambert*, 387 F.3d at 235 (noting that "the language of § 2254(d)(2) and § 2254(e)(1) implies an important distinction . . . We therefore read § 2254(d)(2) and § 2254(e)(1) together as addressing two somewhat different inquiries.").

Section 2254(d)(2) requires a federal court to review the *reasonableness* of the state-court's "determination" of facts – here, its reliance on (part of) Dr. Pan's report and disregard of all the other evidence of Aris' diminished intellectual capacity. Section 2254(e)(1), in contrast, addresses the

correctness of a "factual issue", i.e., a fact. Here that would be, for instance, what Dr. Pan's report actually said, whether Aris was failing his courses, or whether he had trouble with phonics.

As the Third Circuit explained this distinction:

> The fundamental prerequisite to granting the writ on factual grounds is consideration of the evidence relied upon in the state court proceeding. Section 2254(d)(2) mandates the federal habeas court to assess whether the state court's determination was reasonable or unreasonable given that evidence. . . . [A] petitioner may [also] attack specific factual determinations that were made by the state court, and that are subsidiary to the ultimate decision. Here, section 2254(e)(1) comes into play[.]

Lambert, 387 F.3d at 235.

It makes sense that § 2254(e)(1) requires "clear and convincing evidence" to rebut "the presumption of correctness" of particular facts, for that would involve a purely evidentiary determination. But it does not make sense to superimpose that same standard onto § 2254(d)(2) and require "evidence" that a state court made an unreasonable determination, for that is *not* an evidentiary determination but a legal one.

In other words, these are two separate inquiries, made by a federal court acting in two different roles.

The inquiry under § 2254(e)(1) looks at an individual fact that has been established in the state court record, and whether the petitioner has presented clear and convincing evidence that it is wrong. For that inquiry, the federal court acts as fact-finder (a role Aris did not ask the federal courts below to take on). In contrast, the inquiry under § 2254(d)(2) reviews the factual conclusions – "determinations" – the state court reached based on the facts. For that inquiry, the federal court must review, with appropriate deference, the state court's analysis. *See Taylor*, 366 F.3d at 999 (explaining that the § 2254(d)(2) standard is intended for review of "the state court's fact-finding *process*") (emphasis added). To conflate §§ 2254(d)(2) and (e)(1) is thus to improperly merge and diminish the separate functions required by each.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 12, 2011

APPENDIX

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Appendix A

United States Court of Appeals,
Seventh Circuit.
Aris ETHERLY, Petitioner-Appellee,
v.
Randy DAVIS, Warden,* Respondent-Appellant.

No. 09-3535.

Argued Dec. 11, 2009.
Decided Aug. 25, 2010.
As Amended on Denial of Rehearing and Suggestion for Rehearing En Banc Oct. 15, 2010.

Before BAUER, RIPPLE, and KANNE, Circuit Judges.

KANNE, Circuit Judge.

This appeal arises from the district court's decision to grant Aris Etherly's petition for habeas corpus relief pursuant to 28 U.S.C. § 2254. The district court reviewed the Illinois Appellate Court's determination that Etherly's inculpatory statement to the police was voluntary. Based on the applicable "totality of the circumstances" test, the district court ruled such determination by the appellate court was objectively unreasonable. As a result of this ruling, the district court granted Etherly's habeas corpus petition,

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* Randy Davis, who became warden after this appeal was filed, has been substituted for Gregory Schwartz, as the *See* Fed. R. App. P. 43(c)(2).

denied the state's motion to stay the judgment pending appeal, and ordered the state to either retry or release Etherly within 120 days.

The state appealed the denial of its motion for a stay of release and we heard oral arguments on that issue, after which we granted by per curiam opinion the state's motion for a stay. *Etherly v. Schwartz,* 590 F.3d 531 (7th Cir. 2009). We found that because it was not reasonably likely that we would affirm the district court's decision, the traditional factors regulating the issuance of a stay outweighed Etherly's presumption in favor of release pending appeal. We now reverse the grant of habeas corpus relief.

I. BACKGROUND

On the night of July 13, 1995, in Chicago, Illinois, then-fifteen-year-old Aris Etherly and several other members of the Gangster Disciples street gang got into a car and drove around looking to shoot and kill members of a rival gang, the Vice Lords. Jeremy Rush and Henry Wingard were standing on Wingard's front porch when the Gangster Disciples' car approached. Wingard was wearing a cap with the brim turned to the left, signifying that he was a member of the Vice Lords. When the car's occupants started shooting, Wingard safely ducked inside the house, but Rush was not so fortunate. Rush was fatally shot in the head.

Four days after the shooting, Chicago police officers

arrived at Etherly's house between 5:00 and 5:30 in the morning. When Etherly's father answered the door, police noticed that a group of people were, given the early hour, suspiciously gathered in the home. The officers informed the father that they were investigating a shooting and wanted to interview Etherly. There is some dispute concerning the details of this conversation.

The father claimed that the officers were vague, did not inform him where they were taking his son, and that they said that Etherly could be picked up in an hour. In contrast, Detectives Golab and Spencer recounted telling the father that they were taking Etherly to their Area 2 Detective Division office on 111th Street, offered for the father to follow them to the station, and provided the father with a business card. Regardless of what Etherly's father said to the police or what they said to him, the series of events that followed are undisputed.

The officers arrived at the station around 6:00 a.m. with Etherly in tow. Etherly was not interviewed until 8:00 a.m., at which time Youth Officer Frank DiGrazia arrived. With Officer DiGrazia in the room, Detective Spencer first read Etherly his Miranda rights and Etherly stated that he understood those rights. Detective Spencer then questioned Etherly. Etherly initially denied any involvement in the shooting. At no time throughout the day did Officer DiGrazia make an attempt to speak to Etherly.

With no information forthcoming from Etherly, the

interview concluded after thirty minutes. Etherly then requested to use the bathroom, and he was escorted there by an unidentified uniformed officer. Upon his return from the restroom, Etherly requested to speak to Detective Spencer. DiGrazia was not present during this second conversation. Etherly told Detective Spencer that he wanted to show him where the guns involved in the fatal shooting were hidden. Detective Spencer then asked Detective Golab to meet with Etherly, and Detective Golab reminded Etherly of his Miranda rights. Etherly informed the detectives that the uniformed officer had told him that he had an obligation to tell the truth, and that "it would go better for him in court" if he helped the police to locate the guns. Detective Golab testified that he told Etherly that "they could not promise him anything other than to inform the court of his assistance," and Etherly indicated that he understood. Etherly then led the detectives to where the guns were located. The first time the state informed the trial judge of Etherly's cooperation was at the hearing on Etherly's motion to suppress his statements.

Upon his return to the station, Etherly met with Assistant State's Attorney ("ASA") Joseph Alesia, Detective Golab, and Officer DiGrazia. Alesia introduced himself to Etherly and explained that his role was as a prosecutor, not as Etherly's attorney. He then advised Etherly of his Miranda rights, which Etherly claimed to understand. Etherly requested and made a court-reported statement, to which he added his own handwritten statement. In

both statements he confessed to his involvement in the shooting, including the fact that he had fired seven shots.

During the interview with ASA Alesia, Etherly said that he had been treated well by the police, that he understood his rights at all times, and that his statement was voluntary. In response to ASA Alesia's inquiry into whether anyone had made any promises in exchange for Etherly's statement, Etherly replied that the unnamed uniformed officer had told him "to get the guns so the judge would know I helped them."

Prior to the suppression hearing, the trial court ordered that Etherly be evaluated by Dr. Phillip Pan, a staff psychiatrist for Cook County's Forensic Clinical Services. In his report, Dr. Pan stated that Etherly was only marginally cooperative with the interview. He opined that although Etherly was depressed and had borderline intellectual functioning, he found that Etherly was able to understand his Miranda rights and knowingly waive them. The report concluded "that [Etherly] understands that he is not required to talk to the police, ... [and] that he is entitled to have a lawyer present while he is questioned."

Etherly contested the admission of his statement, arguing that it had been made involuntarily and unintelligently. Etherly pointed out that his handwritten statement had a number of spelling errors. Also, Etherly's father testified that Etherly

was illiterate and had been taking special education classes since the second grade. He also testified that Etherly had only attended school through his freshman year of high school, and only then by supplementing the standard curriculum with a special tutor. Still, he had failed all his courses. After balancing all the evidence, the trial court found that Etherly's statement was voluntary. It therefore denied Etherly's motion to suppress the statement.

At trial, Etherly presented a single witness in his defense, Rebecca George. George, a teacher at the Cook County Juvenile Temporary Detention Center where Etherly was held pending trial, testified that Etherly was illiterate. George stated that Etherly progressed slowly during phonics lessons. She observed that he had difficulty knowing the sounds of the letters of the alphabet and that "he uses words ... from how he hears other people use words."

The state's evidence at trial consisted of Wingard's testimony about the shooting; Officer Robert Baike's testimony that he recovered .380-caliber shell casings from the murder scene; Detective Golab's and Detective Spencer's accounts of the investigation, including their interviews with Etherly and his disclosure of the .38-caliber revolver's location; forensic specialist Ernest Warner's conclusion that the bullet found in Rush's brain was fired from the same weapon that fired the .380-caliber casings found at the murder scene; and then-ASA Alesia's testimony regarding Etherly's inculpatory statement. At the close of trial, the jury

found Etherly guilty of first-degree murder. The court sentenced him to a forty-year term of imprisonment.

On appeal to the Illinois Appellate Court, Etherly argued, among other things, that the trial court erred in finding that his inculpatory statement to the police was voluntary. The court applied a totality of the circumstances test to determine whether Etherly's confession was voluntary. The court stated that the relevant factors included "the defendant's age, education, intelligence, experience, and physical condition; whether he was advised of his constitutional rights; the existence of threats, promises or physical or mental coercion; and whether the confession was induced by police deception." (Appellant App. at 36.) The court also addressed the additional factors for determining the voluntariness of juvenile statements, such as the time of day when questioning occurred, the presence or absence of a parent, and the minor's previous experience with the court system. The court stated that "[t]he overriding concern ... is whether the defendant's will was overborne." (*Id.*)

The court found that the following factors weighed in favor of finding that the statement was involuntary: (1) Etherly was fifteen years old at the time of the statement; (2) Etherly had a lack of intellectual capacity; and (3) Etherly had no experience with the criminal justice system. The court then discussed the factors that weighed in favor of finding the statement voluntary: (1) Etherly's father was

informed that his son was wanted for questioning in connection with the shooting; (2) a youth officer was present during the questioning and Etherly never requested to confer with the youth officer; (3) Etherly was read his Miranda rights on several occasions and he repeatedly indicated that he understood his rights; (4) prior to Etherly's inculpatory statement being made, Detective Golab clarified to Etherly that no promises could be made and they could only inform the judge of his assistance; (5) Dr. Pan found that Etherly understood his legal rights; and (6) Etherly was questioned for a limited period of time.

After weighing all of these factors, the appellate court held that "the trial court's findings were not against the manifest weight of the evidence, and the totality of the circumstances indicate that defendant's confession was the result of his own decision and not the result of compulsion or his will being overborne." (*Id.* at 39.) The Illinois Supreme Court subsequently denied Etherly leave to appeal.

Etherly filed a petition for writ of habeas corpus in federal district court in which he raised six grounds for relief, the central argument being that his inculpatory statement to the police was involuntary. The district court granted Etherly's habeas corpus petition on the ground that Etherly's statement was involuntary and that the Illinois Appellate Court's determination "amounted to a[n] unreasonable application of the Supreme Court's 'totality of the circumstances' test." *Etherly v. Schwartz*, 649 F. Supp. 2d 892, 903 (N.D. Ill. 2009). The district court

noted that a reasonable application of that test "compels" the conclusion that Etherly's statement was involuntary. (*Id.*)

The state filed a timely notice of appeal to this court. On appeal, the state argues that the district court erred in holding that the Illinois Appellate Court applied the totality of the circumstances test in an objectively unreasonable manner.

II. ANALYSIS

We review the district court's grant of habeas relief *de novo*. *Northern v. Boatwright*, 594 F.3d 555, 559 (7th Cir. 2010). Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), habeas relief may be granted only when a state court decision is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in the light of the evidence presented." 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 404-05, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); *Morgan v. Krenke*, 232 F.3d 562, 565-66 (7th Cir. 2000).

A decision is "contrary to" federal law when the state court applied a rule that "contradicts the governing law" set forth by the Supreme Court or if the state court reached a different outcome based on facts "materially indistinguishable" from those previously before the Supreme Court. *Williams*, 529 U.S. at 405-06, 120 S. Ct. 1495; *see also Calloway v.*

Montgomery, 512 F.3d 940, 943 (7th Cir. 2008). A state court's application of clearly established federal law is unreasonable if it identifies the appropriate standard but applies it to the facts in a manner with which a reasonable court would disagree. *Williams,* 529 U.S. at 413, 120 S. Ct. 1495; *Williams v. Thurmer,* 561 F.3d 740, 742-43 (7th Cir. 2009).

Mere error is insufficient; "[r]ather, in order to trigger grant of the writ, the state-court decision must be both incorrect and unreasonable." *Woods v. McBride,* 430 F.3d 813, 817 (7th Cir. 2005). Under either prong of the test, unreasonableness is judged by an objective standard. *Burr v. Pollard,* 546 F.3d 828, 831 (7th Cir. 2008). A decision is not objectively unreasonable unless it falls " 'well outside the boundaries of permissible differences of opinion.' " *Starkweather v. Smith,* 574 F.3d 399, 402 (7th Cir. 2009) (*quoting Hardaway v. Young,* 302 F.3d 757, 762 (7th Cir. 2002)). Further, in performing our evaluation, we presume the factual findings of the state court to be correct, unless the petitioner can rebut this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Allen v. Buss,* 558 F.3d 657, 661 (7th Cir. 2009).

As a threshold matter, we must identify the "clearly established Federal law" at issue. For purposes of § 2254, this phrase "refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Taylor,* 529 U.S. at 412, 120 S.Ct. 1495. A determination of whether a confession was involuntary requires an

examination of the "totality of the surrounding circumstances," including the characteristics of the person in custody and the details of the interrogation that resulted in the statement. *Schneckloth v. Bustamonte,* 412 U.S. 218, 225-26, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) (stating that if a defendant's confession is not " 'the product of an essentially free and unconstrained choice by its maker' " and " 'if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process' " (*quoting Culombe v. Connecticut,* 367 U.S. 568, 602, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961))).

This same test applies to confessions by juveniles, but in those cases confessions are to be evaluated with special care. *In re Gault,* 387 U.S. 1, 45, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); *Gilbert v. Merchant,* 488 F.3d 780, 791 (7th Cir. 2007) (*quoting Haley v. Ohio,* 332 U.S. 596, 599, 68 S. Ct. 302, 92 L. Ed. 224 (1948)). The relevant factors to consider include "the juvenile's age, experience, education, background, and intelligence, and ... whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Fare v. Michael C.,* 442 U.S. 707, 725, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979). Other considerations include the "length of time that the juvenile was questioned by the authorities and the absence or presence of a parent or other friendly adult." *Gilbert,* 488 F.3d at 791; *see also Gallegos v. Colorado,* 370 U.S. 49, 54-55, 82 S. Ct. 1209, 8 L. Ed. 2d 325 (1962). We will

also carefully "scrutinize police questioning tactics to determine if excessive coercion or intimidation ... has tainted the juvenile's confession." *Hardaway,* 302 F.3d at 765.

We recognize, however, that "it is the totality of the circumstances underlying a juvenile confession, rather than the presence or absence of a single circumstance, that determines whether or not the confession should be deemed voluntary." *Gilbert,* 488 F.3d at 793; *see also Hardaway,* 302 F.3d at 763-68 (refusing to impose a per se rule that no child under the age of sixteen may waive his rights and denying habeas relief even though a fourteen-year-old's confession was obtained without the presence of a friendly adult); *Fare,* 442 U.S. at 725, 99 S. Ct. 2560.

We find, and there is no dispute, that the Illinois Appellate Court identified and applied the correct governing law to determine whether Etherly's confession was involuntary. The appellate court recognized the correct totality of the circumstances test and applied the factors accordingly. Because relief is therefore unavailable under the "contrary to" prong of § 2254(d)(1), we turn to whether the state appellate court reasonably applied that test.

The district court concluded that the state appellate court's application of the totality of the circumstances test was objectively unreasonable. The district court based its holding on its determination that the state court either placed too much or too little weight on each factor involved. For example,

the district court stated it was "more than a bit skeptical" of the weight the appellate court accorded to Etherly's age, borderline intellectual capacity, and lack of criminal background, which affected his ability to grasp whether police promised leniency in exchange for his statement. *Etherly,* 649 F.Supp.2d at 899. Further, the district court stated that the state court placed too much weight on the lack of a promise of a "specific benefit" in exchange for Etherly's assistance, and too little weight on the unidentified officer's comments to Etherly that he "had a moral obligation" to cooperate, and if he did so, that it would "go better" for him in court. *Id.* Contrary to the state appellate court, the district court opined that Etherly understood the comments to be a promise, and that the police knew that such a suggestion was "reasonably likely to elicit an incriminating response" from Etherly. *Id.* at 899-900 (*citing Rhode Island v. Innis,* 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)). The district concluded that unless Etherly waived his Miranda rights, Etherly's statement should have been inadmissible.

The district court also said that the Illinois Appellate Court put too much weight on the lack of coercion and on the Miranda warnings provided and too little weight on the passiveness of Officer DiGrazia. According to the district court, because of Etherly's age, low intelligence, lack of experience in the criminal justice process, and the presence of a passive youth officer, Etherly could not have made a knowing and intelligent waiver of his Miranda rights.

We pause to note, however, that whether a petitioner made a knowing and voluntary waiver of his Miranda rights is a separate inquiry from a voluntariness claim, *see Edwards v. Arizona,* 451 U.S. 477, 483-84, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), and Etherly never raised the "knowing and voluntary" waiver argument. But because "[i]n evaluating whether a suspect voluntarily waived his *Miranda* rights, we consider the same factors ... in assessing the overall voluntariness of a confession," *Ruvalcaba v. Chandler,* 416 F.3d 555, 562 (7th Cir. 2005), we will discuss the district court's conclusion below.

The district court's opinion notwithstanding, the Illinois Appellate Court properly addressed and considered all of the relevant factors in its analysis. How much weight to assign each factor on facts similar to those in Etherly's case may differ from court to court, and reasonable jurists may certainly disagree. *See Hall v. Washington,* 106 F.3d 742, 748-49 (7th Cir. 1997) ("The statutory 'unreasonableness' standard allows the state court's conclusion to stand if it is one of several equally plausible outcomes."). Therefore, unless the state court's application of these factors was *unreasonable,* the grant of Etherly's habeas corpus petition must be reversed.

The Illinois Appellate Court evaluated and discussed the importance of Etherly's age. Because of his youth, the court also considered whether a friendly adult was present. The court discussed Etherly's

father's awareness of the police interview, his opportunity to come to the station, and his possession of police contact information. Although his father claimed he was unable to locate his son for several days after the interview, the state trial court concluded, and the appellate court agreed, that the officers' testimony was more credible. The court also noted that Officer DiGrazia was present both during the initial questioning and at the time that Etherly provided his written confession. The court said that although the youth officer was passive, Etherly never took advantage of the opportunity to consult with him.

The district court, however, disagreed with the appellate court's finding on this latter factor, commenting that it "cannot be squared with Supreme Court and Seventh Circuit jurisprudence," and it therefore "was unreasonable for the court to consider [the youth officer] as a factor favoring a finding of voluntariness." *Etherly,* 649 F. Supp. 2d at 900-01. We agree with the district court that it is unreasonable to conclude that a fifteen-year-old, with no prior criminal experience, should be expected to seek the advice of a youth officer when that officer does not make his special role known to the minor. But in *Fare,* the Supreme Court "held that a sixteen-year-old could make a statement intelligently and voluntarily, even without the presence of a friendly adult." *Ruvalcaba,* 416 F.3d at 561; *see also Hardaway,* 302 F.3d at 763 ("[T]he mere absence of a friendly adult is by itself insufficient to require suppression of a juvenile confession."); *Johnson v.*

Trigg, 28 F.3d 639 (7th Cir. 1994) (reversing the district court's grant of habeas relief despite the uncounselled confession of a fourteen-year-old with below-average intelligence). In fact, "[e]ven refusing a child's request to have a parent or other friendly adult (other than a lawyer) present is not enough to suppress the confession if other factors indicate that the confession was voluntary." *Hardaway,* 302 F.3d at 765 (*citing Fare,* 442 U.S. at 718, 99 S. Ct. 2560).

In other words, while the Illinois court erred in finding that DiGrazia's presence militated in favor of voluntariness, this lone error is not of such magnitude as to result in an unreasonable application of Supreme Court precedent under AEDPA. *See Hardaway*, 302 F.3d at 763. Therefore, the district court overstated the import of this factor.

The Illinois Appellate Court also recognized and weighed Etherly's lack of intellectual capacity. Although the court concluded that this weighed against admission of the statement, the court credited Dr. Pan's testimony that Etherly understood that he was not required to talk to the police and that the prosecutor would act upon any information provided by Etherly. The district court, however, appearing to engage in a *de novo* review, found that the appellate court only paid "lip service" to this factor, concluding that the probative value and credibility of Dr. Pan's report were undermined by the fact that such report was more than one year old.

The state court's factual findings are entitled to

deference, unless objectively unreasonable in light of the evidence presented in the state-court proceeding. 28 U.S.C. § 2254(e)(1); *Conner v. McBride,* 375 F.3d 643, 649 (7th Cir. 2004). Here, the state court reasonably relied on Dr. Pan's report in concluding that Etherly understood his rights. Etherly did not present clear and convincing evidence to rebut the state court's reasonable reliance on this report. Therefore, the district court erred in reviewing *sua sponte* the state court's findings regarding the probative value of the report and by failing to accord proper deference to those findings. The state court did not give short-shrift to Etherly's low intelligence, and its reliance on Dr. Pan's report was not objectively unreasonable.

With regard to the remaining factors, the Illinois Appellate Court considered whether police engaged in physical or psychological coercion and determined that none existed. The court reasoned that "merely telling [Etherly] to tell the truth ... to show the judge he cooperated does not constitute a promise of leniency nor does it evidence threats or coercion." (Appellant App. at 38.) Further, the court noted that Etherly was given his Miranda warnings on multiple occasions, including after the conversation with the unidentified officer, and he "repeatedly indicated that he understood his rights." (*Id.* at 37.) The court also observed that Detective Golab made clear that the police could make no promises. Thus, despite Etherly's age, lack of intelligence, and lack of criminal background, the state court found that the weight of the evidence, on balance, favored

admission of Etherly's statement.

We agree with the Illinois Appellate Court that the interaction with the unidentified police officer did not rise to the level of coercion. Although we think it obvious that the officer's statement was inadvisable, merely telling somebody to tell the truth is not coercive. *See Johnson,* 28 F.3d at 640-45. We also agree with the appellate court that no specific benefit was promised in exchange for Etherly's cooperation, and Detective Golab made it clear that no promises would be forthcoming.

The Illinois Appellate Court considered the appropriate factors in coming to its voluntariness determination and, although it erred in one respect, it did not unreasonably apply Supreme Court precedent. *See Hardaway*, 302 F.3d at 763.

III. CONCLUSION

The Illinois Appellate Court identified the correct totality of the circumstances test, considered all relevant factors, and made a legally defensible determination that Etherly's inculpatory statement was voluntary. Although not every reasonable jurist would have reached the same outcome, we hold that the appellate court's analysis and conclusion were not objectively unreasonable under the law. Therefore, Etherly's petition for habeas corpus relief should have been denied.

For the foregoing reasons, we REVERSE the

judgment of the district court and REMAND for further proceedings consistent with this opinion.

Appendix B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 09-3535

ARIS ETHERLY,

Petitioner-Appellee,

v.

RANDY DAVIS,
WARDEN,*

Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 07 C 0057-**Elaine E. Bucklo**, *Judge.*

ARGUED DECEMBER 11, 2009—DECIDED AUGUST 25, 2010

Before BAUER, RIPPLE, and KANNE, *Circuit Judges.*

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* Randy Davis, who became warden after this appeal was filed, has been substituted for Gregory Schwartz, as the appellant. *See* Fed. R. App. P. 43(c)(2).

KANNE, *Circuit Judge*. This appeal arises from the district court's decision to grant Aris Etherly's petition for habeas corpus relief pursuant to 28 U.S.C. § 2254. The district court reviewed the Illinois Appellate Court's determination that Etherly's inculpatory statement to the police was voluntary. Based on the applicable "totality of the circumstances" test, the district court ruled such determination by the appellate court was objectively unreasonable. As a result of this ruling, the district court granted Etherly's habeas corpus petition, denied the state's motion to stay the judgment pending appeal, and ordered the state to either retry or release Etherly within 120 days.

The state appealed the denial of its motion for a stay of release and we heard oral arguments on that issue, after which we granted by per curiam opinion the state's motion for a stay. *Etherly v. Schwartz*, 590 F.3d 531 (7th Cir. 2009). We found that because it was not reasonably likely that we would affirm the district court's decision, the traditional factors regulating the issuance of a stay outweighed Etherly's presumption in favor of release pending appeal. We now reverse the grant of habeas corpus relief.

IV. BACKGROUND

On the night of July 13, 1995, in Chicago, Illinois, then-fifteen-year-old Aris Etherly and several other members of the Gangster Disciples street gang got into a car and drove around looking to shoot and kill members of a rival gang, the Vice

Lords. Jeremy Rush and Henry Wingard were standing on Wingard's front porch when the Gangster Disciples' car approached. Wingard was wearing a cap with the brim turned to the left, signifying that he was a member of the Vice Lords. When the car's occupants started shooting, Wingard safely ducked inside the house, but Rush was not so fortunate. Rush was fatally shot in the head.

Four days after the shooting, Chicago police officers arrived at Etherly's house between 5:00 and 5:30 in the morning. When Etherly's father answered the door, police noticed that a group of people were, given the early hour, suspiciously gathered in the home. The officers informed the father that they were investigating a shooting and wanted to interview Etherly. There is some dispute concerning the details of this conversation.

The father claimed that the officers were vague, did not inform him where they were taking his son, and that they said that Etherly could be picked up in an hour. In contrast. Detectives Golab and Spencer recounted telling the father that they were taking Etherly to their Area 2 Detective Division office on 111th Street, offered for the father to follow them to the station, and provided the father with a business card. Regardless of what Etherly's father said to the police or what they said to him, the series of events that followed are undisputed.

The officers arrived at the station around 6:00 a.m. with Etherly in tow. Etherly was not interviewed until 8:00 a.m., at which time Youth

Officer Frank DiGrazia arrived. With Officer DiGrazia in the room. Detective Spencer first read Etherly his Miranda rights and Etherly stated that he understood those rights. Detective Spencer then questioned Etherly. Etherly initially denied any involvement in the shooting. At no time throughout the day did Officer DiGrazia make an attempt to speak to Etherly.

With no information forthcoming from Etherly, the interview concluded after thirty minutes. Etherly then requested to use the bathroom, and he was escorted there by an unidentified uniformed officer. Upon his return from the restroom, Etherly requested to speak to Detective Spencer. DiGrazia was not present during this second conversation. Etherly told Detective Spencer that he wanted to show him where the guns involved in the fatal shooting were hidden. Detective Spencer then asked Detective Golab to meet with Etherly, and Detective Golab reminded Etherly of his Miranda rights. Etherly informed the detectives that the uniformed officer had told him that he had an obligation to tell the truth, and that "it would go better for him in court" if he helped the police to locate the guns. Detective Golab testified that he told Etherly that "they could not promise him anything other than to inform the court of his assistance," and Etherly indicated that he understood. Etherly then led the detectives to where the guns were located. The first time the state informed the trial judge of Etherly's cooperation was at the hearing on Etherly's motion to suppress his statements.

Upon his return to the station, Etherly met with Assistant State's Attorney ("ASA") Joseph Alesia, Detective Golab, and Officer DiGrazia. Alesia introduced himself to Etherly and explained that his role was as a prosecutor, not as Etherly's attorney. He then advised Etherly of his Miranda rights, which Etherly claimed to understand. Etherly requested and made a court-reported statement, to which he added his own handwritten statement. In both statements he confessed to his involvement in the shooting, including the fact that he had fired seven shots.

During the interview with ASA Alesia, Etherly said that he had been treated well by the police, that he understood his rights at all times, and that his statement was voluntary. In response to ASA Alesia's inquiry into whether anyone had made any promises in exchange for Etherly's statement, Etherly replied that the unnamed uniformed officer had told him "to get the guns so the judge would know I helped them."

Prior to the suppression hearing, the trial court ordered that Etherly be evaluated by Dr. Phillip Pan, a staff psychiatrist for Cook County's Forensic Clinical Services. In his report, Dr. Pan stated that Etherly was only marginally cooperative with the interview. He opined that although Etherly was depressed and had borderline intellectual functioning, he found that Etherly was able to understand his Miranda rights and knowingly waive them. The report concluded "that [Etherly]

understands that he is not required to talk to the police, . . . [and] that he is entitled to have a lawyer present while he is questioned."

Etherly contested the admission of his statement, arguing that it had been made involuntarily and unintelligently. Etherly pointed out that his handwritten statement had a number of spelling errors. Also, Etherly's father testified that Etherly was illiterate and had been taking special education classes since the second grade. He also testified that Etherly had only attended school through his freshman year of high school, and only then by supplementing the standard curriculum with a special tutor. Still, he had failed all his courses. After balancing all the evidence, the trial court found that Etherly's statement was voluntary. It therefore denied Etherly's motion to suppress the statement.

At trial, Etherly presented a single witness in his defense, Rebecca George. George, a teacher at the Cook County Juvenile Temporary Detention Center where Etherly was held pending trial, testified that Etherly was illiterate. George stated that Etherly progressed slowly during phonics lessons. She observed that he had difficulty knowing the sounds of the letters of the alphabet and that "he uses words . . . from how he hears other people use words."

The state's evidence at trial consisted of Wingard's testimony about the shooting; Officer Robert Baike's testimony that he recovered .380-caliber shell casings from the murder scene; Detective Golab's and Detective Spencer's accounts of

the investigation, including their interviews with Etherly and his disclosure of the .38-caliber revolver's location; forensic specialist Ernest Warner's conclusion that the bullet found in Rush's brain was fired from the same weapon that fired the .380-caliber casings found at the murder scene; and then-ASA Alesia's testimony regarding Etherly's inculpatory statement. At the close of trial, the jury found Etherly guilty of first-degree murder. The court sentenced him to a forty-year term of imprisonment.

On appeal to the Illinois Appellate Court, Etherly argued, among other things, that the trial court erred in finding that his inculpatory statement to the police was voluntary. The court applied a totality of the circumstances test to determine whether Etherly's confession was voluntary. The court stated that the relevant factors included "the defendant's age, education, intelligence, experience, and physical condition; whether he was advised of his constitutional rights; the existence of threats, promises or physical or mental coercion; and whether the confession was induced by police deception." (Appellant App. at 36.) The court also addressed the additional factors for determining the voluntariness of juvenile statements, such as the time of day when questioning occurred, the presence or absence of a parent, and the minor's previous experience with the court system. The court stated that "[t]he overriding concern ... is whether the defendant's will was overborne." (*Id.*)

The court found that the following factors weighed in favor of finding that the statement was involuntary: (1) Etherly was fifteen years old at the time of the statement; (2) Etherly had a lack of intellectual capacity; and (3) Etherly had no experience with the criminal justice system. The court then discussed the factors that weighed in favor of finding the statement voluntary: (1) Etherly's father was informed that his son was wanted for questioning in connection with the shooting; (2) a youth officer was present during the questioning and Etherly never requested to confer with the youth officer; (3) Etherly was read his Miranda rights on several occasions and he repeatedly indicated that he understood his rights; (4) prior to Etherly's inculpatory statement being made, Detective Golab clarified to Etherly that no promises could be made and they could only inform the judge of his assistance; (5) Dr. Pan found that Etherly understood his legal rights; and (6) Etherly was questioned for a limited period of time.

After weighing all of these factors, the appellate court held that "the trial court's findings were not against the manifest weight of the evidence, and the totality of the circumstances indicate that defendant's confession was the result of his own decision and not the result of compulsion or his will being overborne." (*Id.* at 39.) The Illinois Supreme Court subsequently denied Etherly leave to appeal.

Etherly filed a petition for writ of habeas corpus in federal district court in which he raised six

grounds for relief, the central argument being that his inculpatory statement to the police was involuntary. The district court granted Etherly's habeas corpus petition on the ground that Etherly's statement was involuntary and that the Illinois Appellate Court's determination "amounted to a[n] unreasonable application of the Supreme Court's 'totality of the circumstances' test." *Etherly v. Schwartz*, 649 F. Supp. 2d 892, 903 (N.D. Ill. 2009). The district court noted that a reasonable application of that test "compels" the conclusion that Etherly's statement was involuntary. (*Id.*)

The state filed a timely notice of appeal to this court. On appeal, the state argues that the district court erred in holding that the Illinois Appellate Court applied the totality of the circumstances test in an objectively unreasonable manner.

V. ANALYSIS

We review the district court's grant of habeas relief *de novo*. *Northern v. Boatwright*, 594 F.3d 555, 559 (7th Cir. 2010). Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), habeas relief may be granted only when a state court decision is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in the light of the evidence presented." 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 404-05 (2000); *Morgan v. Krenke*, 232 F.3d 562, 565-66 (7th Cir. 2000).

A decision is "contrary to" federal law when the state court applied a rule that "contradicts the governing law" set forth by the Supreme Court or if the state court reached a different outcome based on facts "materially indistinguishable" from those previously before the Supreme Court. *Williams*, 529 U.S. at 405-06; *see also Calloway v. Montgomery*, 512 F.3d 940, 943 (7th Cir. 2008). A state court's application of clearly established federal law is unreasonable if it identifies the appropriate standard but applies it to the facts in a manner with which a reasonable court would disagree. *Williams*, 529 U.S. at 413; *Williams v. Thurmer*, 561 F.3d 740, 742-43 (7th Cir. 2009).

Mere error is insufficient; "[r]ather, in order to trigger grant of the writ, the state-court decision must be both incorrect and unreasonable." *Woods v. McBride*, 430 F.3d 813, 817 (7th Cir. 2005). Under either prong of the test, unreasonableness is judged by an objective standard. *Burr v. Pollard*, 546 F.3d 828, 831 (7th Cir. 2008). A decision is not objectively unreasonable unless it falls "'well outside the boundaries of permissible differences of opinion.'" *Starkweather v. Smith*, 574 F.3d 399, 402 (7th Cir. 2009) (*quoting Hardaway v. Young*, 302 F.3d 757, 762 (7th Cir. 2002)). Further, in performing our evaluation, we presume the factual findings of the state court to be correct, unless the petitioner can rebut this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Allen v. Buss*, 558 F.3d 657, 661 (7th Cir. 2009).

As a threshold matter, we must identify the "clearly established Federal law" at issue. For purposes of § 2254, this phrase "refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Taylor*, 529 U.S. at 412. A determination of whether a confession was involuntary requires an examination of the "totality of the surrounding circumstances," including the characteristics of the person in custody and the details of the interrogation that resulted in the statement. *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973) (stating that if a defendant's confession is not "'the product of an essentially free and unconstrained choice by its maker'" and "'if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process'" (*quoting Culombe v. Connecticut*, 367 U.S. 568, 602 (1961))).

This same test applies to confessions by juveniles, but in those cases confessions are to be evaluated with special care. *In re Gault*, 387 U.S. 1, 45 (1967); *Gilbert v. Merchant*, 488 F.3d 780, 791 (7th Cir. 2007) (*quoting Haley v. Ohio*, 332 U.S. 596, 599 (1948)). The relevant factors to consider include "the juvenile's age, experience, education, background, and intelligence, and . . . whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Fare v. Michael C.*, 442 U.S. 707, 725 (1979). Other considerations include the "length of time that the

juvenile was questioned by the authorities and the absence or presence of a parent or other friendly adult." *Gilbert*, 488 F.3d at 791; *see also Gallegos v. Colorado*, 370 U.S. 49, 54-55 (1962). We will also carefully "scrutinize police questioning tactics to determine if excessive coercion or intimidation . . . has tainted the juvenile's confession." *Hardaway*, 302 F.3d at 765.

We recognize, however, that "it is the totality of the circumstances underlying a juvenile confession, rather than the presence or absence of a single circumstance, that determines whether or not the confession should be deemed voluntary." *Gilbert*, 488 F.3d at 793; *see also Hardaway*, 302 F.3d at 763-68 (refusing to impose a per se rule that no child under the age of sixteen may waive his rights and denying habeas relief even though a fourteen-year-old's confession was obtained without the presence of a friendly adult); *Fare*, 442 U.S. at 725.

We find, and there is no dispute, that the Illinois Appellate Court identified and applied the correct governing law to determine whether Etherly's confession was involuntary. The appellate court recognized the correct totality of the circumstances test and applied the factors accordingly. Because relief is therefore unavailable under the "contrary to" prong of § 2254(d)(1), we turn to whether the state appellate court reasonably applied that test.

The district court concluded that the state appellate court's application of the totality of the circumstances test was objectively unreasonable. The

district court based its holding on its determination that the state court either placed too much or too little weight on each factor involved. For example, the district court stated it was "more than a bit skeptical" of the weight the appellate court accorded to Etherly's age, borderline intellectual capacity, and lack of criminal background, which affected his ability to grasp whether police promised leniency in exchange for his statement. *Etherly*, 649 F. Supp. 2d at 899. Further, the district court stated that the state court placed too much weight on the lack of a promise of a "specific benefit" in exchange for Etherly's assistance, and too little weight on the unidentified officer's comments to Etherly that he "had a moral obligation" to cooperate, and if he did so, that it would "go better" for him in court. *Id.* Contrary to the state appellate court, the district court opined that Etherly understood the comments to be a promise, and that the police knew that such a suggestion was "reasonably likely to elicit an incriminating response" from Etherly. *Id.* at 899-900 (*citing Rhode Island v. Innis*, 446 U.S. 291 (1980)). The district concluded that unless Etherly waived his Miranda rights, Etherly's statement should have been inadmissible.

The district court also said that the Illinois Appellate Court put too much weight on the lack of coercion and on the Miranda warnings provided and too little weight on the passiveness of Officer DiGrazia. According to the district court, because of Etherly's age, low intelligence, lack of experience in the criminal justice process, and the presence of a

passive youth officer, Etherly could not have made a knowing and intelligent waiver of his Miranda rights.

We pause to note, however, that whether a petitioner made a knowing and voluntary waiver of his Miranda rights is a separate inquiry from a voluntariness claim, *see Edwards v. Arizona*, 451 U.S. 477, 483-84 (1981), and Etherly never raised the "knowing and voluntary" waiver argument. But because "[i]n evaluating whether a suspect voluntarily waived his *Miranda* rights, we consider the same factors ... in assessing the overall voluntariness of a confession," *Ruvalcaba v. Chandler*, 416 F.3d 555, 562 (7th Cir. 2005), we will discuss the district court's conclusion below.

The district court's opinion notwithstanding, the Illinois Appellate Court properly addressed and considered all of the relevant factors in its analysis. How much weight to assign each factor on facts similar to those in Etherly's case may differ from court to court, and reasonable jurists may certainly disagree. *See Hall v. Washington*, 106 F.3d 742, 748-49 (7th Cir. 1997) ("The statutory 'unreasonableness' standard allows the state court's conclusion to stand if it is one of several equally plausible outcomes."). Therefore, unless the state court's application of these factors was *unreasonable*, the grant of Etherly's habeas corpus petition must be reversed.

The Illinois Appellate Court evaluated and discussed the importance of Etherly's age. Because of his youth, the court also considered whether a

friendly adult was present. The court discussed Etherly's father's awareness of the police interview, his opportunity to come to the station, and his possession of police contact information. Although his father claimed he was unable to locate his son for several days after the interview, the state trial court concluded, and the appellate court agreed, that the officers' testimony was more credible. The court also noted that Officer DiGrazia was present both during the initial questioning and at the time that Etherly provided his written confession. The court said that although the youth officer was passive, Etherly never took advantage of the opportunity to consult with him.

The district court, however, disagreed with the appellate court's finding on this latter factor, commenting that it "cannot be squared with Supreme Court and Seventh Circuit jurisprudence," and it therefore "was unreasonable for the court to consider [the youth officer] as a factor favoring a finding of voluntariness." *Etherly*, 649 F. Supp. 2d at 900-01. We agree with the district court that it is unreasonable to conclude that a fifteen-year-old, with no prior criminal experience, should be expected to seek the advice of a youth officer when that officer does not make his special role known to the minor. But in *Fare*, the Supreme Court "held that a sixteen-year-old could make a statement intelligently and voluntarily, even without the presence of a friendly adult." *Ruvalcaba*, 416 F.3d at 561; *see also Hardaway*, 302 F.3d at 763 ("[T]he mere absence of a friendly adult is by itself insufficient to require

suppression of a juvenile confession."); *Johnson v. Trigg*, 28 F.3d 639 (7th Cir. 1994) (reversing the district court's grant of habeas relief despite the uncounseled confession of a fourteen-year-old with below-average intelligence). In fact, "[e]ven refusing a child's request to have a parent or other friendly adult (other than a lawyer) present is not enough to suppress the confession if other factors indicate that the confession was voluntary." *Hardaway*, 302 F.3d at 765 (*citing Fare*, 442 U.S. at 718).

In other words, the youth officer does not, and should not, play the role of a lawyer to the minor. The officer's presence is more than what is required by law to safeguard against any abuse of process or coercion. Therefore, the district court overstated the import of this factor and was incorrect in concluding that the state appellate court unreasonably weighed its impact.

The Illinois Appellate Court also recognized and weighed Etherly's lack of intellectual capacity. Although the court concluded that this weighed against admission of the statement, the court credited Dr. Pan's testimony that Etherly understood that he was not required to talk to the police and that the prosecutor would act upon any information provided by Etherly. The district court, however, appearing to engage in a *de novo* review, found that the appellate court only paid "lip service" to this factor, concluding that the probative value and credibility of Dr. Pan's report were undermined by the fact that such report was more than one year old.

The state court's factual findings are entitled to deference, unless objectively unreasonable in light of the evidence presented in the state-court proceeding. 28 U.S.C. § 2254(e)(1); *Conner v. McBride*, 375 F.3d 643, 649 (7th Cir. 2004). Here, the state court reasonably relied on Dr. Pan's report in concluding that Etherly understood his rights. Etherly did not present clear and convincing evidence to rebut the state court's reasonable reliance on this report. Therefore, the district court erred in reviewing *sua sponte* the state court's findings regarding the probative value of the report and by failing to accord proper deference to those findings. The state court did not give short-shrift to Etherly's low intelligence, and its reliance on Dr. Pan's report was not objectively unreasonable.

With regard to the remaining factors, the Illinois Appellate Court considered whether police engaged in physical or psychological coercion and determined that none existed. The court reasoned that "merely telling [Etherly] to tell the truth ... to show the judge he cooperated does not constitute a promise of leniency nor does it evidence threats or coercion." (Appellant App. at 38.) Further, the court noted that Etherly was given his Miranda warnings on multiple occasions, including after the conversation with the unidentified officer, and he "repeatedly indicated that he understood his rights." (*Id.* at 37.) The court also observed that Detective Golab made clear that the police could make no promises. Thus, despite Etherly's age, lack of intelligence, and lack of criminal background, the

state court found that the weight of the evidence, on balance, favored admission of Etherly's statement.

We agree with the Illinois Appellate Court that the interaction with the unidentified police officer did not rise to the level of coercion. Although we think it obvious that the officer's statement was inadvisable, merely telling somebody to tell the truth is not coercive. *See Johnson*, 28 F.3d at 640-45. We also agree with the appellate court that no specific benefit was promised in exchange for Etherly's cooperation, and Detective Golab made it clear that no promises would be forthcoming.

The Illinois Appellate Court did not fail to consider relevant material factors or grossly miscalculate the balance. Therefore, in light of the fact that Etherly was read his rights several times and understood them, was questioned for a very limited period of time, and was not coerced, we conclude that the Illinois Appellate Court's determination that Etherly's statement was voluntary under the totality of the circumstances did not fall well outside the boundaries of permissible differences of opinion. It therefore was not objectively unreasonable.

VI. CONCLUSION

The Illinois Appellate Court identified the correct totality of the circumstances test, considered all relevant factors, and made a legally defensible determination that Etherly's inculpatory statement was voluntary. Although not every reasonable jurist

would have reached the same outcome, we hold that the appellate court's analysis and conclusion were not objectively unreasonable under the law. Therefore, Etherly's petition for habeas corpus relief should have been denied.

For the foregoing reasons, we REVERSE the judgment of the district court and REMAND for further proceedings consistent with this opinion.

Appendix C

United States District Court,
N.D. Illinois,
Eastern Division.
Aris ETHERLY, Petitioner,
v.
Gregory SCHWARTZ, Respondent.
No. 07 C 0057.

Aug. 28, 2009.
Order Granting Motion to Alter Judgment and Denying Request for Stay Oct. 9, 2009.

MEMORANDUM OPINION AND ORDER

ELAINE E. BUCKLO, District Judge.

On July 17, 1995, then-fifteen year old Aris Etherly was awakened by police officers at his family's home at approximately 5 a.m. He was taken in handcuffs to the police station, where he was questioned intermittently over the ensuing hours in conjunction with a gang-related shooting in Chicago. After initially denying any involvement in the killing, Etherly later incriminated himself in statements to law enforcement. He was charged and ultimately convicted of first degree murder and sentenced to forty years of imprisonment. Now incarcerated at the Pinckneyville Correctional Center, where respondent Gregory Schwartz is the acting warden,[3] Mr. Etherly

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[3] Ken Bartley, Pinckneyville's warden at the time Mr. Etherly filed his petition, was originally named as the defendant in this

seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 to overturn his conviction and sentence. For the reasons that follow, I grant his petition.

I.

On the night of July 13, 1995, Jeremy Rush was shot and killed while visiting with his friend Henry Wingard on Wingard's front porch. Wingard described the circumstances surrounding the shooting at Mr. Etherly's trial. According to his testimony, Wingard was standing on his porch at 103 W. 112th Street in Chicago, accompanied by Rush. Wingard was a member of the Vice Lords street gang and was wearing a hat turned to the left, signifying his gang affiliation. After hearing gunshots, Wingard ran into the house. He returned to find Rush lying on the steps of the porch, bleeding. Rush later died of a gunshot wound to the head. Wingard did not identify any shooters.

Four days later, five police officers, including Detectives Theodore Golab, Robert Flood, and Cornelius Spencer, arrested Mr. Etherly at his family home. The officers arrived sometime between 5:00 and 6:00 a.m., while Mr. Etherly slept. They awakened Mr. Etherly, then handcuffed him and transported him in a police vehicle to the Area 2 police station. The officers told Mr. Etherly's father that his son was being taken to the police station for questioning, and that Mr. Etherly, Sr., could drive to

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action. Bartley is automatically replaced by the acting warden pursuant to Fed. R. Civ. P. 25(d)(1).

the station in his own car. Mr. Etherly's father did not go to the station and did not have any contact with his son for the next three days.

Upon arrival at the police station at around 6:00 a.m., Mr. Etherly was left alone in an interview room until approximately 8:00 a.m., when Youth Officer Frank "Joe" DiGrazia arrived, accompanied by Detective Spencer. At that time, Detective Spencer read Mr. Etherly his *Miranda* warnings and questioned him. Mr. Etherly denied knowing anything about the shooting. He was then left alone in the interview room. The youth officer never spoke to Mr. Etherly, or at all, during the questioning.

At around 10 a.m., Mr. Etherly called Detective Spencer and told him that he wanted to show him where the weapons were located. Mr. Etherly told Detective Spencer that a uniformed police officer had escorted him to the restroom, and, while there, told him he had "an obligation to tell the truth about where the guns were located." *People v. Etherly,* No. 1-97-4582, (Ill. App. 1st Dist. 1997) (Rule 23 Order) ("*Etherly* ") at 2. Detective Spencer then contacted Detective Golab, who along with Detective Flood resumed Mr. Etherly's questioning. Mr. Etherly was not Mirandized at that time, but Detective Golab reminded Mr. Etherly that the rights of which he had previously been advised were "still in effect." Mr. Etherly again stated that a uniformed officer told him he had an obligation to tell the truth, and that if he helped the police to locate the guns "it would go better for him in court." *Etherly* at 3. Detective Golab

testified that he told Mr. Etherly it "was nice he wanted to show us where the weapons were at, but we couldn't promise him anything" other than to "inform the court of his assistance." (Tr. F27, F41.) Mr. Etherly said "that's all right." (Tr. F27) He was then placed in a police car, without a youth officer, and led the detectives to the location of the weapons. Afterwards, Mr. Etherly was returned to the same interview room in the police station.

Later that day, at around 1:00 or 2:00 p.m., Mr. Etherly was interviewed by Assistant State's Attorney ("ASA") Joseph Alesia. Detective Golab and Youth Officer DiGrazia were also present for the interview. The ASA introduced himself, explained that he was a prosecutor and not Mr. Etherly's attorney, and advised Mr. Etherly of his *Miranda* rights. Mr. Etherly said that he understood those rights, then gave a statement. When the ASA asked Mr. Etherly if he would be willing to reduce his statement to writing, or to have the statement transcribed by a court-reporter, Mr. Etherly agreed to a court-reported statement.

In his court-reported statement, Mr. Etherly said that he was a member of the Gangster Disciples street gang, and that on the night of the shooting, he joined several friends-also Gangster Disciples-who said they wanted to kill some Vice Lords. When Mr. Etherly and his gangmates arrived at 112th Street, they saw some boys on a porch and noticed a hat turned to the left. Mr. Etherly and his friends began shooting. Mr. Etherly fired a total of seven shots,

then ran away as his gangmates continued to fire. This statement was the first time Mr. Etherly confessed to any involvement in the shooting.

In response to questions posed by the ASA, Mr. Etherly indicated that he had been treated well by law enforcement, given food ("some chips and pop"), and allowed to use the restroom. He also said that his statement was voluntary. In response to the question, "[h]as anybody made any promises or threats to you in return for your statement?," Mr. Etherly answered "[o]ne of them made a promise. Told me to get the guns." The State's Attorney then asked, "[t]hat's one of the uniformed officers?" and Mr. Etherly responded "yeah." Mr. Etherly later added, in his own handwriting, that the uniformed police officer told him to get the weapons "so the judge would know I helped them."[4] In the handwritten addition, Mr. Etherly was unable to spell any word more than three letters in length, spelling "judge" g-u-b-g-e and "would" w-o-l-e-d, and asking ASA Alesia how to spell the words "know," "helped," and "them." When directed to print his full name on each page of the statement, Mr. Etherly misspelled or miswrote it several times. Youth Officer DiGrazia made no attempt to speak to Mr. Etherly at any time throughout his questioning.

Prior to trial, Mr. Etherly moved, unsuccessfully, to have his court-reported statement suppressed.

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[4] Law enforcement did not, in fact, inform the trial judge of Mr. Etherly's cooperation. The judge learned of his cooperation for the first time at the suppression hearings. (Tr. F87.)

Evidence elicited at the suppression hearings, and again at trial, raised questions about Mr. Etherly's competence to understand and knowingly waive his *Miranda* rights, and about whether Mr. Etherly was coerced into confessing by the "promises" Mr. Etherly claimed he received from the unidentified uniformed officer. At the suppression hearings, Mr. Etherly's father testified that his son was illiterate and had been in special education since the second grade. He further testified that although his son had a special tutor for each of his classes his first year in high school, he had failed all of his courses. At trial, Rebecca George, a teacher at the Cook County Juvenile Temporary Detention Center where Mr. Etherly was held pending his trial, testified that after she discovered Mr. Etherly could not read or write, she met with him two or three times a week over a five month period to work on phonics.[5] George stated that at the time she began working with Mr. Etherly, he was "completely illiterate," and that their phonics work progressed much more slowly than with other students. George testified that Mr. Etherly spent approximately a month "sounding out really A through E," that it was "very difficult for him to even know what sounds went with A or B or C or D," and that even after five months of work, he had not progressed to the end of the alphabet. George also testified that Mr. Etherly had "a very limited vocabulary ... the way he uses words are from how he hears other people use words." (Tr. K122-K124.)

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[5] The appellate court did not address George's testimony.

Pursuant to the trial court's order, Mr. Etherly was evaluated in December 1996 by Dr. Philip Pan, a staff psychiatrist for Forensic Clinical Services. Dr. Pan diagnosed Mr. Etherly with "an adjustment disorder with depressed mood, and borderline intellectual functioning." (Tr. C42.) Dr. Pan opined, however, that defendant understood his *Miranda* rights and was able to waive them. The Pan report states:

> [a]lthough he was only marginally cooperative with the interview, I feel that Mr. Etherly understands that he is not required to talk to the police, that the legal system will act upon any information given to them, that he is entitled to have a lawyer present while he is questioned, and that if he can't afford a lawyer that he will be appointed a public defender who he will not have to pay for.

(Tr. C42.)

At the close of trial, Mr. Etherly was convicted of first-degree murder. Throughout his state court appeals, Mr. Etherly argued that his statement to the police should have been suppressed on the ground that it was involuntary.[6] The Illinois Court

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[6] Mr. Etherly appealed his conviction and sentence in both direct and post-conviction proceedings, in which he asserted a number of other claims, a few of which are also presented here. I need not address the details of these proceedings, since it is undisputed that the claim on which I grant Mr. Etherly's petition was properly presented throughout "one complete

rejected this argument, concluding that

> while his age, lack of intellectual capacity and lack of criminal background are factors which weigh against admission of the statement, Dr. Pan found that, although defendant had borderline intellectual functioning, he understood that he was not required to talk to police, and that the legal system would act upon any information given to them .... the totality of the circumstances indicate (sic) that defendant's confession was the result of his own decision and not the result of compulsion or his will being overborne.
> *Etherly* at 8-9.

On habeas, Mr. Etherly reiterates the claim that his statement was involuntary, and that its admission at trial violated his rights under the Constitution.[7]

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round" of state court proceedings, and therefore may now be reviewed on the merits. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999).

[7] While the pre- *Miranda* cases of *Haley* and *Gallegos* analyze the use of coerced confessions with reference to the due process clause of the Fourteenth Amendment, *Miranda* made clear that the Fifth Amendment also requires that any statement made to law enforcement by an individual in custody is inadmissible unless it was obtained after the individual "knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda v. Arizona*, 384 U.S. 436, 475, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The later authorities on which Mr. Etherly relies, beginning with *In re Gault*, typically analyze the issue with reference to both amendments. Although Mr. Etherly's petition and supporting memoranda are not specific on this point, I understand his

II.

My review of the Illinois Appellate Court's decision is governed by 28 U.S.C. § 2254, which provides a "highly deferential standard of review." *Woodford v. Visciotti,* 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (citing *Lindh v. Murphy,* 521 U.S. 320, 333 n. 7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997)). Under the terms of § 2254, I may grant a petition for a writ of habeas corpus only if the state court proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence" presented during the state court proceedings. 28 U.S.C. § 2254(d). A state court decision is "contrary to" federal law if it "contradicts the governing law set forth" in Supreme Court cases, or if it "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from" the Court's precedent. *Williams v. Taylor,* 529 U.S. 362, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). An "unreasonable application" of Supreme Court precedent "occurs when 'the state court unreasonably applies it to the facts of the particular state prison[er]'s case.' " *A.M. v. Butler,* 360 F.3d 787, 794 (7th Cir. 2004) (quoting *Williams* 529 U.S. at 405, 120 S. Ct. 1495).

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claim to assert violations of both his Fifth and Fourteenth Amendment rights.

"Where a police interrogation proceeds without the presence of an attorney and the police obtain a statement, 'a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.' " *U.S.* ex rel. *A.M. v. Butler,* No. 98 C 5625, 2002 WL 1348605 at *16 (N.D. Ill., June 19, 2002) (Pallmeyer, J.) (quoting *Miranda v. Arizona,* 384 U.S. 436, 475, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)), *aff'd* 360 F.3d 787 (7th Cir. 2004). The voluntariness of a confession depends on the totality of the circumstances, including "both the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte,* 412 U.S. 218, 226, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). Confessions by juveniles "must be evaluated with 'special care.'" *Gilbert v. Merchant,* 488 F.3d 780, 791 (7th Cir. 2007) (quoting *Haley v. Ohio,* 332 U.S. 596, 599, 68 S. Ct. 302, 92 L. Ed. 224 (1948); *In re Gault,* 387 U.S. 1, 45, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967)). As the Court admonished in *Gault,* "the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." 387 U.S. at 55, 87 S. Ct. 1428. Among the relevant considerations in this inquiry are "the juvenile's age, experience, education, background and intelligence, and ... whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Fare v. Michael C.,* 442 U.S.

707, 725, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979) (citation omitted). Courts must also consider the "length of time that the juvenile was questioned by the authorities and the absence or presence of a parent or other friendly adult." *Gilbert,* 488 F.3d at 791.

In its treatment of Mr. Etherly's claim that his statement was involuntary, the appellate court correctly identified the governing "totality of the circumstances" test, then went on to name the factors to be considered: "the defendant's age, education, intelligence, experience, and physical condition; the length of the questioning; whether he was advised of his constitutional rights; the existence of threats, promises, or physical or mental coercion; and whether the confession was induced by police deception." *People v. Etherly,* No. 1-97-4582, (Ill. App. 1st Dist. 1997) (Rule 23 Order) ("*Etherly*") at 6 (citation omitted). The court further noted that "additional considerations for juveniles include the time of day when questioning occurred, the presence or absence of a parent or guardian, and the minor's previous experience with the court system." *Id.* (Citations omitted) The court concluded, "[t]he overriding concern, however, is whether the defendant's will was overborne." *Id.* (Citing *People v. Brown,* 169 Ill. 2d 132, 144, 214 Ill. Dec. 433, 661 N.E.2d 287 (Ill. 1996)).

The court then proceeded to analyze Mr. Etherly's claim, placing particular emphasis on the issue of whether his statement was coerced through a

promise of leniency. From a constitutional standpoint, its analysis is problematic in several respects. To begin with, while it is certainly true that a coerced statement cannot, consistent with the standards established in *Miranda v. Arizona* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), be deemed voluntary, it does not follow, in the case of juvenile defendants, that any statement free from coercion passes constitutional muster.[8] The Court emphasized just this point in *In re Gault,* where it held that "the greatest care must be taken to assure that the admission was voluntary, in the sense *not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright, or despair.*" 387 U.S. at 55, 87 S. Ct. 1428. (Emphasis added). The Seventh Circuit echoed this proposition in *Hardaway v. Young,* 302 F.3d 757, 765 (7th Cir. 2002), when it held that where juvenile defendants are involved, "we will scrutinize police questioning tactics to determine if excessive coercion or intimidation *or simple immaturity that would not affect an adult* has tainted the juvenile's confession." (Emphasis added). Yet, after singling out coercion (i.e., "whether the defendant's will was overborne") as "the overriding concern," the appellate court held-citing two Illinois cases not involving juvenile defendants-that because the police did not promise Mr. Etherly a "specific

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[8] Although *Colorado v. Connelly,* 479 U.S. 157, 170, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986), suggests that some coercive state action is essential to a finding of involuntariness where adult defendants are concerned, *In re Gault* makes clear that the absence of coercion is not dispositive in juvenile cases.

benefit" in exchange for his confession, his confession was not involuntary. *Etherly* at 8. This reasoning cannot be reconciled with *Gault* and *Hardaway*.

First, I am more than a bit skeptical that any fifteen year old boy, much less one of limited intellectual capacity with no previous experience with the criminal justice system, is likely to grasp the nuanced distinction the appellate court drew between the assurance Mr. Etherly received that "it would go better for him in court" if he helped the police locate weapons, on the one hand, and the promise of a "specific benefit" in exchange for his assistance, on the other. Even assuming, however, that the appellate court correctly (or at least reasonably) resolved the narrow question of whether the uniformed officer's statement amounted to a "promise of leniency," it unreasonably failed to consider the likely impact of that statement and subsequent police statements on Mr. Etherly. As the Supreme Court held in *Rhode Island v. Innis,* 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980),

> the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. *The latter portion of*

> *this definition focuses primarily on the perceptions of the suspect,* rather than the intent of the police.

Id. at 300-01, 100 S. Ct. 1682. (Emphasis added) While the *Innis* Court was concerned primarily with the scope of the term "interrogation," its observation that the subjective perceptions of the individual in custody are clearly relevant in this context. Indeed, there is no need to speculate about how Mr. Etherly perceived the uniformed officer's statement, since Mr. Etherly made clear that he understood the statement as a "promise," and that his decision to give the police information was based on that promise. Regardless of whether the uniformed officer promised Mr. Etherly a "specific benefit," the statement that it would "go better" for Mr. Etherly in court if he cooperated with the police, and the suggestion that Mr. Etherly had a moral obligation to do so, were, at a minimum, "reasonably likely to elicit an incriminating response" from Mr. Etherly. Accordingly, Mr. Etherly's subsequent statement is inadmissible under *Miranda* and *Innis* unless he knowingly and intelligently waived his right to remain silent and to consult with counsel.[9]

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[9] The facts in *Innis* bear an interesting resemblance to the facts of this case. In *Innis,* the suspect was arrested for armed robbery and repeatedly given his *Miranda* warnings. After indicating that he understood his rights, he invoked his right to remain silent and requested counsel. While riding to the police station in the back of a police vehicle, the suspect overheard a conversation between two police officers in the front, in which the officers discussed their desire to find the gun used in the robbery because there was a school for handicapped children in the vicinity. One of the officers stated, "God forbid one of them

Yet the appellate court's emphasis on whether Mr. Etherly was coerced through a promise of leniency caused it to gloss over critical factors bearing on whether Mr. Etherly understood (much less knowingly and intelligently waived) his *Miranda* rights. In just one paragraph, the court addressed two key factors pertinent to this issue: first, that Youth Officer DiGrazia was present at certain points during Mr. Etherly's questioning "to ensure that defendant's rights were protected," and second, that Mr. Etherly had received *Miranda* warnings and indicated that he understood them. The court held that both of these factors supported the conclusion that Mr. Etherly's confession was voluntary.

The presence of an entirely passive youth officer, however, does not weigh in favor of a finding of voluntariness. The Seventh Circuit has made clear that " 'a state-provided youth officer who functions as

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might find a weapon with shells and they might hurt themselves." At that point, the suspect interrupted the officers' conversation, said that he wanted to show them where the gun was, and directed them to the location where the gun was found. Although the Court ultimately declined to hold that *Miranda* had been violated, reasoning that the record failed to establish that the police "should have known their statements were reasonably likely to elicit an incriminating response," so their statements fell outside the scope of "interrogation," it acknowledged that the defendant had indeed been subjected to "subtle compulsion." In this case, of course, not only was the compulsion significantly less subtle, but the uniformed officer's statements appear to have been designed specifically to elicit an incriminating response from Mr. Etherly.

nothing more than an observer will not be considered a friendly adult presence for purposes of the totality of the circumstances.' " *A.M.,* 360 F.3d at 801 (quoting *Hardaway,* 302 F.3d at 765). On the facts of this case, it was unreasonable for the court to consider the utterly unhelpful presence of Youth Officer DiGrazia as a factor favoring a finding of voluntariness. To begin with, the appellate court grossly understated DiGrazia's role as a "passive" one. In fact, not only is there no evidence that the youth officer took any affirmative steps to safeguard Mr. Etherly's constitutional rights, I have found nothing in the record to indicate that DiGrazia's ostensible role was even explained to Mr. Etherly, who, from all that the record reveals, had no reason to know what DiGrazia was doing there. Compare this situation to the one in *Hardaway.* In *Hardaway,* the ASA explained to the defendant "that Geraci was a youth officer and that he was present as an observer and to assist Hardaway if he had any questions or problems. Geraci asked Hardaway if there was anything he could assist him with, to which Hardaway responded no." *Id.* at 761. Even on these facts, the Seventh Circuit characterized the youth officer as being "as much assistance to Hardaway as a potted plant" and concluded that there was "no friendly adult presence" during Hardaway's interrogation. *Id.* at 765. The Supreme Court has repeatedly cited the lack of a friendly adult presence as a factor weighing against a finding of voluntariness, *Gallegos,* 370 U.S. at 54-55, 82 S. Ct. 1209; *Haley,* 332 U.S. at 600-01, 68 S. Ct. 302, a consideration frequently echoed by the Seventh

Circuit. *Gilbert,* 488 F.3d at 792 n.2; *A.M.,* 360 F.3d at 801; *Ruvalcaba,* 416 F.3d at 561 n.1; *Hardaway,* 302 F.3d at 765.

Nevertheless, the appellate court not only weighed DiGrazia's unexplained, passive presence as a factor in favor of voluntariness, it actually faulted Mr. Etherly-a youthful novice in the criminal justice system with borderline intellectual functioning-for failing to avail himself of the assistance of this unidentified individual. I agree with the observation by Mr. Etherly's counsel that embracing the appellate court's reasoning would lead to a perverse result. The presence of a passive youth officer, whose function is to protect the rights of a juvenile, will be held against the juvenile unless the juvenile affirmatively seeks the youth officer's assistance. Such a result cannot be squared with Supreme Court and Seventh Circuit jurisprudence.

The appellate court further erred in considering the *Miranda* warnings Mr. Etherly received as a factor militating in favor of voluntariness. In *Haley v. Ohio,* 332 U.S. 596, 68 S. Ct. 302, 92 L. Ed. 224 (1948), the Supreme Court concluded that no weight at all should be given to the fact that the signed confession of the fifteen year old defendant in that case began with the acknowledgment that he had been advised of his constitutional rights. *Id.* at 605, 68 S. Ct. 302. The Court explained that it would not assume "that a boy of fifteen, without aid of counsel, would have a full appreciation of that advice." *Id.* at 601, 68 S. Ct. 302. The Court made similar observations in

Gallegos, when it noted that a fourteen year old boy is unlikely to grasp the consequences of his answers to police questioning, and is "unable to know how to prote[c]t his own interests or how to get the benefits of his constitutional rights." 370 U.S. at 54, 82 S. Ct. 1209. In *Haley,* the Court concluded that in view of the juvenile defendant's presumed inability to appreciate the consequences of waiving his rights, "we cannot give any weight to recitals which merely formalize constitutional requirements." *Id.* at 601, 68 S. Ct. 302. And in *A.M.,* the Seventh Circuit observed that there was "no reason to believe" that the defendant in that case "could understand the inherently abstract concepts of the Miranda rights and what it means to waive them." 360 F.3d 787, 801 at n.11.[10]

In this case, police officers and ASA Alesia advised Mr. Etherly of his *Miranda* rights in a formulaic fashion, then asked him to acknowledge that he understood those rights, but neither the detectives, nor the ASA, nor Youth Officer DiGrazia made any attempt to probe the boy's actual understanding of the rights recited or asked him to explain the meaning of the warnings in his own words. *Compare Hardaway,* 302 F.3d at 761 (after being advised of *Miranda* rights, juvenile defendant "explained his rights back to [the ASA] in his own words, stating

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[10] The Seventh Circuit cited *Grisso,* "Juvenile's Capacities to Waive *Miranda* Rights: An Empirical Analysis," 68 Calif. L.Rev. 1134, 1141-42, 1153-54, 1160 (1980), in which 96 percent of 14-year-olds were found to lack an adequate understanding of the consequences of waiving their rights.

that he did not have to speak with [her] if he didn't want to, that anything he told [her] she could tell a judge in a trial against him, that he could have an attorney there when he was questioned about the case, even if he or his family couldn't pay for one.") Indeed, the evidence is that the *Miranda* warnings Mr. Etherly received exemplified the kind of rote "recitals which merely formalize constitutional requirements" that the Court disregarded in *Haley* because of the defendant's youth. Accordingly, the appellate court arguably transgressed *Haley*, based on Mr. Etherly's age alone, by according any weight at all to the fact that he formally received *Miranda* warnings. This transgression reached the level of unreasonable error, however, when factors beyond Mr. Etherly's youth are taken into account.

At the time of his arrest, Mr. Etherly had no criminal history or experience with the criminal justice system. Like the juvenile defendant in *A.M. v. Butler*, 360 F.3d 787 (7th Cir. 2004), a case in which the Seventh Circuit upheld a grant of habeas relief, Mr. Etherly "was not a seasoned juvenile delinquent." *Id.* at 797; *compare Michael C.*, 442 U.S. at 726, 99 S. Ct. 2560 (finding juvenile confession voluntary where juvenile had "considerable experience with the police" in light of his multiple arrests, time served in a youth camp, and probation); and *Hardaway v. Young*, 302 F.3d 757, 767 (7th Cir. 2002) (finding juvenile confession voluntary where juvenile had nineteen previous arrests). Although the appellate court cited Mr. Etherly's lack of a criminal background as among the factors militating

against a finding of voluntariness, it accorded no ascertainable weight to this factor.

Moreover, Mr. Etherly was a learning disabled high school freshman[11] with "borderline intellectual functioning" and a "very limited vocabulary," who was failing all of his classes and unable to read, write, or spell basic words. These factors underscore the unlikelihood that Mr. Etherly's acknowledgment of his *Miranda* rights indicated any meaningful understanding of-much less a knowing waiver of-those rights. *See Withrow v. Williams*, 507 U.S. 680, 693, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993) (education of defendant is among "crucial element[s]" to consider in determining voluntariness) (citing *Clewis v. Texas*, 386 U.S. 707, 712, 87 S. Ct. 1338, 18 L. Ed. 2d 423 (1967)); *Reck v. Pate*, 367 U.S. 433, 441, 81 S. Ct. 1541, 6 L. Ed. 2d 948 (1961) (defendant's "subnormal intelligence" considered along with youth and lack of previous experience with the police in concluding confession was involuntary). Although the appellate court paid lip

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[11] In his court reported statement, which was taken in July (when I presume school was not in session), Mr. Etherly stated that he was in tenth grade. The appellate court found, based on the testimony of Mr. Etherly's father, that Mr. Etherly was a freshman in high school at the time of the events. It is not clear that these facts are inconsistent (a reasonable conclusion is that Mr. Etherly was between his freshman and sophomore years at the time of the events), but in any event, since there is no dispute that Mr. Etherly was functionally illiterate and had failed all of his classes in school, I see no relevance to whether he was formally in his first or second year of high school.

service to Mr. Etherly's "lack of intellectual capacity" as a factor weighing against voluntariness, its analysis failed to account for this factor in any meaningful way.

Ultimately, the only evidence the appellate court cited to support its conclusion that Mr. Etherly indeed understood his rights was Dr. Pan's opinion. But the probative value of that opinion is questionable. Dr. Pan's report was prepared in December of 1996, nearly a year and a half after Mr. Etherly's arrest, and it discusses Mr. Etherly's understanding of his rights in the present tense. Thus, on its face, the report says little about whether Mr. Etherly had the ability, at the time of his arrest (as opposed to after spending over a year in custody), knowingly to waive his *Miranda* rights.[12] In light of the overwhelming evidence of Mr. Etherly's serious intellectual shortcomings, it was unreasonable for the appellate court to conclude, based on the Pan report alone, that Mr. Etherly understood and effectively waived the rights that were recited to him in a formulaic manner, without any guidance or support from any "friendly adult."

III.

For the foregoing reasons, the Illinois Appellate Court's determination that Mr. Etherly's confession

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[12] The report does state, "I see no evidence that Mr. Etherly was not able to understand and waive his Miranda Rights." The remainder of the analysis, however, discusses Mr. Etherly's understanding in the present tense.

was voluntary amounted to a unreasonable application of the Supreme Court's "totality of the circumstances" test. A reasonable application of that test to the facts of this case compels the conclusion that Mr. Etherly's statement was obtained without due regard for the procedural safeguards established in *Miranda,* so the admission of that statement at Mr. Etherly's trial violated his Fifth and Fourteenth Amendment rights.[13] Respondent does not contend, nor does it appear from the record, that this error was harmless under *Brecht v. Abrahamson,* 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). Accordingly, Mr. Etherly's petition for a writ of habeas corpus is granted.[14]

MEMORANDUM OPINION AND ORDER

On August 28, 2009, I granted Aris Etherly's petition for a writ of habeas corpus because I concluded that the confession on which his conviction was based was not voluntary, and that the Illinois Appellate Court's determination to the contrary was an unreasonable application of Supreme Court precedent. Now before me are two motions by respondent: a motion to alter the judgment and a motion to stay the judgment pending appeal. For the reasons stated below, I grant the motion to alter the judgment but deny the

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[13] Because I find that Mr. Etherly is entitled to habeas relief on this basis, I need not reach the merits of his additional claims and express no opinion on them.

[14] Mr. Etherly's motion for discovery is denied as moot in light of the present ruling.

request for a stay.

The order accompanying my August 28th opinion did not require specific action on the part of respondent but stated, "Etherly's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 to overturn his conviction and sentence is granted." Respondent seeks to amend that order to read: "Petitioner's Petition for Writ of Habeas Corpus is Granted. Petitioner Aris Etherly shall be released from custody on the conviction challenged in this action unless the State of Illinois commences proceedings to afford petitioner a new trial within 120 days of the entry of this judgment, subject to delays agreed upon by the parties or necessitated by any pretrial motions filed by petitioner." Petitioner opposes the motion but acknowledges that upon granting a habeas petition, district courts commonly specify a period of time in which the state must either retry or release the petitioner. In fact, the Supreme Court noted in *Herrera v. Collins,* 506 U.S. 390, 403, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993), that "[t]he typical relief granted in federal habeas corpus is a conditional order of release unless the State elects to retry the successful habeas petitioner...." While it is far from clear that the state will ultimately be able to mount a convincing case against petitioner without reliance on his involuntary confession, in light of the presumption favoring "conditional" orders of release, it is not unreasonable to allow the state the requested 120-day period to examine its options.

The tables are turned, however, with respect to respondent's request for a stay, as it is petitioner who benefits from a presumption in his favor pursuant to Fed. R.App. Proc. 23(c). *O'Brien v. O'Laughlin*, ---U.S. ----, ----, 130 S. Ct. 5, 6, 174 L. Ed. 2d 602, 2009 WL 2831420 at *1 (2009) ("There is a presumption of release pending appeal where a petitioner has been granted habeas relief."). To overcome this presumption, respondent must demonstrate that the "traditional factors" to be analyzed when considering whether to stay weigh in favor of a grant. *Id; see also Hilton v. Braunskill*, 481 U.S. 770, 775, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987). These factors are:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits ...; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

O'Brien, --- U.S. ----, ----, 130 S. Ct. 5, 6, 174 L. Ed. 2d 602, 2009 WL 2831420 at *1 (Citations omitted). These factors do not militate in favor of a stay in this case.

As to the first factor, the crux of respondent's argument seems to be that the stringency of the standard for granting habeas relief under 28 U.S.C. § 2254, makes it unlikely that the court of appeals will agree with my determination that it was met in this

case. I am not persuaded by this argument. My August 28th opinion squarely acknowledges the "highly deferential standard of review" to which state court judgments are entitled under § 2254, *Etherly v. Schwartz,* No. 07 C 57, 649 F. Supp. 2d. 892, 897, 2009 WL 2768421 at *3 (quoting *Woodford v. Visciotti,* 537 U.S. 19, 24, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002)), and respondent mischaracterizes my analysis by describing it as a mere "disagreement" with the state court's application of Supreme Court jurisprudence.

Respondent similarly fails to show that he will suffer irreparable injury in the absence of a stay. The injury he claims is that of "having to prosecute a potentially expensive retrial that may be rendered unnecessary by a successful appeal." But the state is entitled (and may indeed be wise) to postpone the initiation of a new trial until the conclusion of its appeal. *See Hampton v. Leibach,* No. 99 C 5473, 2001 WL 1618737 (Dec. 18, 2001) (Kennelly, J.). A decision not to issue a stay simply does not force the state's hand in the way respondent suggests. Moreover, respondent's argument that the state will suffer irreparable injury if petitioner is released because petitioner presents a danger to the public, while perhaps not entirely speculative (respondent submits petitioner's Department of Corrections disciplinary record, which reflects several incidents of threatened or actual violence), is not so persuasive as to tip the scales in respondent's favor. It is undisputed that petitioner has no criminal record other than the conviction challenged in his habeas

petition. And respondent's claim that irreparable harm will result if he is forced to release "an admitted murderer" into the community is flawed in several respects: First, respondent's characterization of petitioner relies on the very admission I held to be involuntary. Second, petitioner's conduct as a fifteen year old adolescent is, in any event, insufficiently reliable as a predictor of how he may now behave in the community (as a twenty-nine year old man, after more than a decade in custody) to eclipse petitioner's interest in being released from a presumptively invalid prison sentence.

The third factor-substantial harm to the petitioner-clearly weighs against a stay. Petitioner "suffers irreparable harm each day that he is imprisoned in violation of the United States Constitution." *Hampton*, 2001 WL 1618737 at *2 (quoting *Burdine v. Johnson*, 87 F. Supp. 2d 711, 717 (S.D. Tex. 2000)).

Finally, while the public has an interest in keeping dangerous individuals out of the community, it also has an interest in maintaining the integrity of the criminal justice system. In this case, as noted above, the evidence of petitioner's danger to the community is insufficient to outweigh the common interest in freedom from unconstitutional criminal convictions.

For the foregoing reasons, respondent's motion to stay the judgment of August 28, 2009, is denied, and respondent's motion to alter the judgment of August 28, 2009, is granted. The court's order should now state, "Petitioner's Petition for Writ of Habeas

Corpus is Granted. Petitioner Aris Etherly shall be released from custody on the conviction challenged in this action unless the State of Illinois commences proceedings to afford petitioner a new trial within 120 days of the entry of this judgment, subject to delays agreed upon by the parties or necessitated by any pretrial motions filed by petitioner."

Appendix D

NOTICE
The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

August 4, 2000

No. 1-97-4582

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	No. 95-CR-23152
v.	)	
ARIS ETHERLY,	)	Honorable Dennis J. Porter, Judge Presiding.
Defendant-Appellant.	)	

ORDER

Following a jury trial, defendant Aris Etherly was convicted of first degree murder and sentenced to 40 years' imprisonment. He contends on appeal that the trial court erred in denying his motion to suppress his involuntary post-arrest statement,

abused its discretion in allowing a witness to testify regarding photographs of gang-related graffiti, and sentenced him to an excessive prison term considering his age, lack of criminal history, rehabilitative potential, and other mitigating factors. For the following reasons, we affirm the judgment of the circuit court

Defendant's conviction arose from the fatal shooting of Jeremy Rush on July 13, 1995, while Rush was standing on the front porch of his friend Henry Wingard's home at 103 West 112th Street in Chicago. Prior to trial, defendant filed a motion to suppress his confession, alleging that it was not voluntarily given. At the hearing on the motion, the State introduced the testimony of Chicago Police Detectives Cornelius Spencer and Theodore Golab.

Detective Spencer testified that at about 6 a.m. on the morning of July 17, 1995, he accompanied Detective Golab and his partner to defendant's home where he was taken into custody and transported to police headquarters. Defendant was taken to an interview room on the second floor and was left by himself, without handcuffs, with the door to the room unlocked. Spencer stated that he did not speak with defendant until Youth Officer Frank "Joe" DiGrazia arrived at 8 a.m. because he was aware that defendant was only 15 years old. At that time, he read defendant his *Miranda* warnings in the presence of DiGrazia. Defendant indicated that he understood them and denied knowing anything about the shooting.

Spencer further testified that at 10 a.m. defendant asked to speak with him because he wanted to show him where the weapons were located. Defendant told him that a uniformed police officer had escorted him to the washroom and, while there, told him he had an obligation to tell the truth about where the guns were located. Spencer relayed this information to Detective Golab and had no further contact with defendant.

Detective Golab testified that in the early morning on July 17, 1997, he went to defendant's home and spoke with his father. He told the father that they were investigating a shooting and wanted to take defendant into custody for questioning. He handed the father a business card, including his name, the address of the police station, and a phone number, and told him they would be on the second floor. According to Golab, the father did not ask any questions or request to come with the officers to the police station.

The next contact Golab had with defendant was at 10 a.m. after Detective Spencer told him that defendant wanted to show them where the weapons were located. He explained to defendant who he was and notified him that the rights previously read to him were still in effect. He asked defendant if he understood those rights. Defendant indicated that he understood and explained to him that the officer told him that, if he helped locate the weapons, "it would go better for him in court." Golab stated that he told defendant they could not promise him anything other than to inform the court of his

assistance, and defendant indicated that would be all right. He led the detectives to 115th Street and Perry where the weapons were recovered and inventoried.

At about 1 or 2 p.m., defendant was returned to the same interview room where he was questioned by Assistant State's Attorney (ASA) Joseph Alesia while in the presence of Golab and Youth Officer DiGrazia. According to Golab, ASA Alesia introduced himself, explained to defendant that he was not his attorney and read him his *Miranda* warnings, which defendant indicated he understood. Defendant made a statement and, when asked if he would be willing to reduce it to writing, he agreed to give a court-reported statement. Prior to recording the statement, defendant was given his *Miranda* warnings again and was told that he would be prosecuted as an adult. Defendant indicated in the statement that he understood his *Miranda* rights, that he was treated well, was given food, was allowed to use the restroom, and was giving his statement voluntarily. He further added to his statement in his own handwriting that a uniformed police officer told him to get the weapons "so the judge would know I helped him." Several words were misspelled. Defendant then signed the statement on each page along with ASA Alesia and Youth Officer DiGrazia.

Defendant's father, Leon Etherly, testified that the police arrived at his home on the morning of July 17, 1995, and told him they were taking defendant to the police station for questioning and that he could pick defendant up in about an hour.

The police denied his request to come with them but did tell him that he could drive himself in his own car to Area Two. After a couple of hours, Etherly tried to locate his son by calling both police stations in the area but was told that defendant was not at either station. He was unable to locate defendant until defendant called him from the Audy Home three days later. At that time, Etherly stated that defendant told him the police had questioned him about a murder, beat him up, and made him sign a paper in order to let him leave. Defendant did not indicate to him that he was being treated for any injuries, and Etherly did not see any bruises at that time or inquire about any mistreatment.

Etherly further testified that defendant was illiterate and had been taking special education classes since the second grade. He was currently a freshman in high school, taking regular classes with a tutor, but was failing all of the classes. Defendant was evaluated by Dr. Philip Pan, a staff psychiatrist for Forensic Clinical Services, pursuant to the trial court's order. Although he diagnosed defendant with borderline intellectual functioning, it was his opinion to a reasonable degree of medical and psychiatric certainty that defendant understood his *Miranda* rights, understood that he was not required to talk to the police, and that the police would act upon information given to them.

After making specific findings of fact on the record, the trial court held that, based on the totality of the circumstances, defendant's confession was

freely and voluntarily made and denied the motion to suppress.

On appeal, defendant contends that the court erred in denying his motion to suppress his statements because the police circumvented the Juvenile Court Act, violating his constitutional rights. Specifically, defendant argues that he was questioned outside the presence of a parent, the youth officer did not speak to him while he was in custody, and he was subjected to physical or psychological threats from an unidentified uniformed police officer.

A confession is admissible only if it was made freely and voluntarily and without any direct or implied promises or improper influence. *People v. McNeal*, 298 Ill. App. 3d 379, 390, 698 N.E.2d 652, 659 (1998). Whether a confession is voluntary depends upon the totality of the circumstances, even when a juvenile is concerned. *In re G.O.*, 191 Ill. 2d 37, 54, 727 N.E.2d 1003, 1012 (2000).

Factors to be considered include the defendant's age, education, intelligence, experience, and physical condition; the length of the questioning; whether he was advised of his constitutional rights; the existence of threats, promises, or physical or mental coercion; and whether the confession was induced by police deception. *In re G.O.*, 191 Ill. 2d at 54, 727 N.E.2d at 1012.

Additional considerations for juveniles include the time of day when questioning occurred, the presence or absence of a parent or guardian, and the

minor's previous experience with the court system. *In re A.R.*, 295 Ill. App. 3d 527, 533, 693 N.E.2d 869, 874 (1998); *In re J.J.C.*, 294 Ill. App. 3d 227, 234, 689 N.E.2d 1172, 1178 (1998). The overriding concern, however, is whether the defendant's will was overborne. *People v. Brown*, 169 Ill. 2d 132, 144, 661 N.E.2d 287, 292 (1996). In reviewing a motion to suppress a confession, the trial court's factual findings will be reversed only if they are against the manifest weight of the evidence. However, the ultimate question of whether the confession was voluntary is reviewed *de novo*. *In re G.O.*, 191 Ill. 2d at 50, 727 N.E.2d at 1010. Each case must be evaluated based on its own particular set of circumstances. *People v. Bernasco*, 138 Ill. 2d 349, 368, 562 N.E.2d 958, 966 (1990).

While the police have a statutory duty to make a reasonable attempt to notify the minor's parents or guardian at the time the minor is taken into custody (705 ILCS 405/5-6(1) (2) (West 1996)),[1] the statute does not mandate that they confer with the juvenile prior to questioning or that they be present during questioning. Nor does the statute require that the minor be seen by a youth officer before questioning. Rather, parental notification and/or consultation with a youth officer are but two factors to be considered when evaluating the totality of the

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[1] Section 5-6 has been amended under the Juvenile Justice Reform Provisions of 1998 (Pub. Act 90-590, art. 2001, §2001-10, eff. January 1, 1999), now codified at 705 ILCS 405/5-405(1) and (2) (705 ILCS Ann. 405/5-405(1) (2), at 109-10 (Smith-Hurd 1999)). The notification requirements have not changed.

circumstances. *McNeal*, 298 Ill. App. 3d at 391, 698 N.E.2d at 660.

Here, defendant's father was told that defendant was wanted for questioning involving a shooting. The officer gave him his business card, told him where he was being taken, and told defendant's father he could drive his own car to the station. While the father claimed that he was unable to locate his son, the trial court found Detective Golab's testimony to be more credible. It was for the trial court to weigh the conflicting testimony (*McNeal*, 298 Ill. App. 3d at 392, 698 N.E.2d at 660) and, when applying the facts to the law, they do not evidence conduct by the police to frustrate a parent's attempt to confer with a minor. See *In re Lashun H.*, 284 Ill. App. 3d 545, 554-55, 672 N.E.2d 331, 337-38 (1996).

Furthermore, Youth Officer DiGrazia was present during the initial questioning and at the time defendant gave his written confession to ensure that defendant's rights were protected. While his presence was passive, defendant had an opportunity to confer with the youth officer and never requested to do so. See *People v. Bobe*, 227 Ill. App. 3d 681, 704, 592 N.E.2d 301, 315 (1992)). He was given his *Miranda* warnings on several occasions and repeatedly indicated that he understood his rights. Indeed, the record reflects that he knew how to assert himself when necessary as evidenced by his making additions to his written statement.

Defendant also argues that his court-reported statement, that "[o]ne of [the officers] made

promises, told me to get the guns so the Judge would know I helped them," constituted a promise of leniency, which resulted in psychological coercion. To constitute a promise of leniency that would render a confession involuntary, "the statement must be coupled with a suggestion of a specific benefit that will follow if defendant confesses." *People v. Johnson*, 285 Ill. App. 3d 802, 808, 674 N.E.2d 844, 848 (1996). Thus, merely encouraging a defendant to tell the truth without informing him of a specific benefit does not render the confession involuntary. *Johnson*, 285 Ill. App. 3d at 808, 674 N.E.2d at 848 (statement that if defendant told the truth the judge would see he cooperated, and might take it into consideration, did not render confession involuntary); *People v. Hartgraves*, 31 Ill. 2d 375, 381, 202 N.E.2d 33, 36 (1964).

Similarly, in the instant case, merely telling defendant to tell the truth about the whereabouts of the guns to show the judge that he cooperated does not constitute a promise of leniency nor does it evidence threats or coercion. Detective Golab specifically testified that he told defendant they could not promise him anything and could only inform the judge of his assistance.

Additionally, while his age, lack of intellectual capacity and lack of criminal background are factors which weigh against admission of the statement, Dr. Pan found that, although defendant had borderline intellectual functioning, he understood that he was not required to talk to police, and that the legal system would act upon any information given to

them. Furthermore, although defendant claimed to have been beaten by police, his own court-reported statement was to the contrary, he was questioned for a limited period of time, and no other evidence suggested any physical coercion. Accordingly, the trial court's findings were not against the manifest weight of the evidence, and the totality of the circumstances indicate that defendant's confession was the result of his own decision and not the result of compulsion or his will being overborne.

We next address defendant's contention that the trial court abused its discretion in allowing Henry Wingard to testify as an expert regarding the meaning of various photographs depicting gang graffiti. The State maintains that Wingard was called as a lay witness to testify about gang rivalry, and that the testimony was relevant to corroborate defendant's statement, assist the jury in understanding it, and to show motive.

At trial, Wingard testified that he was a member of the Vice Lords gang at the time of the occurrence, and that the Gangster Disciples were a rival gang in the area. On the night of the occurrence he was standing on his front porch with the victim, wearing a white hat turned to the left as a sign of his affiliation with the Vice Lords. He heard shots being fired and ran into the house. When he emerged, the victim was lying at the bottom of the porch steps with a bullet in his head.

Wingard was shown various photographs of gang graffiti and explained to the jury the meaning behind the gang insignias. He testified that the six-

pointed star or pitchfork depicted in the photographs represented the symbol of his rival, the Gangster Disciples. He further explained that the photograph depicting the graffiti "VL killer" and "[H]ook killer" could be found in his neighborhood, and would have been put there by a Gangster Disciple, and that "[H]ooks" meant Vice Lords. No foundation was ever presented regarding the photographs, and they were never published to the jury.

Even assuming a lack of foundation or relevance for the testimony and the photographs, we find that any alleged error was harmless. Erroneous admission of gang evidence does not automatically warrant reversal. The effect of inflammatory evidence depends upon the circumstances of the case. *People v. Easley*, 148 Ill. 2d 281, 330, 592 N.E.2d 1036, 1058 (1992). Error in admitting evidence is harmless when the competent evidence in the record establishes a defendant's guilt beyond a reasonable doubt and it can be concluded that a retrial without the erroneous evidence would produce the same result. *People v. Arman*, 131 Ill. 2d 115, 124, 545 N.E.2d 658, 662 (1989).

Here, regardless of whether the case had been submitted to the jury with or without Wingard's evidence, the jury would still have been presented with the gang evidence by defendant's own statement. Therein, he admitted to being a Gangster Disciple, and admitted that on the night of the murder he joined his codefendants in their search to "kill some [H]ooks," that "[H]ooks" were rival Vice Lords, and that the area where the victim was killed

was "[H]ooks" territory. Because motive could have been inferred from this evidence alone, defendant cannot show that any unfair prejudice resulted or that, without Wingard's photograph-assisted testimony, a jury would have acquitted him. Additionally, according to the firearms expert, the fatal bullet was fired from defendant's weapon to the exclusion of all others. Therefore, there was other sufficient competent evidence to support defendant's conviction.

Defendant next contends that the imposition of a 40-year prison sentence for first degree murder constituted an abuse of discretion because the trial court failed to adequately consider his age, lack of criminal background, his difficult childhood, and rehabilitative potential.

The sentencing range for a term of imprisonment for first degree murder is 20 to 60 years. 730 ILCS 5/5-8-1(a) (1) (a) (West 1998). It is well established that a sentence that falls within the statutory range will not be disturbed on appeal absent an abuse of discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74, 659 N.E.2d 1306, 1308 (1995). Much deference is afforded to the trial court because it is in a better position than a reviewing court to determine an appropriate sentence and weigh the defendant's credibility, demeanor, and general moral character. *People v. Streit*, 142 Ill. 2d 13, 19, 566 N.E.2d 1351, 1353 (1991). A reviewing court will not substitute its judgment for that of a sentencing court merely because it would have weighed the

sentencing factors differently. *Streit*, 142 Ill. 2d at 19, 566 N.E.2d at 1353.

Factors relevant to the sentencing determination include the nature of the crime, protection of the public, deterrence and punishment, as well as the defendant's rehabilitative potential. *People v. Whitehead*, 171 Ill. App. 3d 900, 908, 525 N.E.2d 1084, 1089 (1988). While rehabilitation must be considered as an important objective of the sentence (*People v. Norfleet*, 259 Ill. App. 3d 381, 395, 630 N.E.2d 1231, 1243 (1994)), rehabilitative potential is not entitled to greater weight than the seriousness of the offense (*People v. Coleman*, 166 Ill. 2d 247, 261, 652 N.E.2d 322, 329 (1995)).

Applying these factors to the instant case, the trial court did not abuse its considerable discretion in imposing a sentence 20 years less than the statutory maximum for first degree murder. The record clearly reflects that the trial court gave due weight to the mitigating factors, including rehabilitative potential. However, the court found that a lengthy sentence was necessary to deter others from committing such crimes and was necessary to protect the public. The court noted that defendant shot a "completely innocent person minding their own business on the streets of Chicago," and that this was "mindless violence." Accordingly, the record reflects that the trial court did not abuse its considerable sentencing discretion.

We further reject defendant's argument that his sentence was excessive in light of other sentences imposed in allegedly similar cases and in light of his

codefendants 20- and 29-year sentences. The comparative sentence approach has been soundly rejected as fundamentally flawed. *People v. Fern*, 189 Ill. 2d 48, 55, 723 N.E.2d 207, 210 (1999). Furthermore, the trial court specifically noted the distinction between defendant's behavior and that of his codefendants, stating "there is one big difference between you and the others. I think the evidence fairly shows you are the actual killer of [the victim]. That puts you in a different category from the others." Thus, defendant has failed to establish that the trial court abused its discretion in imposing the statutorily authorized 40-year sentence.

Accordingly, the judgment of the circuit court is affirmed. As part of this judgment we grant the State's motion and assess defendant $100 as costs for this appeal.

Affirmed.

THEIS, P.J., with GREIMAN and QUINN, JJ., concurring.

Appendix E

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 15, 2010

Before

WILLIAM J. BAUER, *Circuit Judge*

KENNETH F. RIPPLE, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

No. 09-3535

ARIS ETHERLY,
Petitioner-Appellee,

v.

RANDY DAVIS, Warden,
Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 07 C 0057

Elaine E. Bucklo,
Judge.

ORDER

On consideration of the petition for panel rehearing and suggestion for rehearing en banc filed by Petitioner-Appellee on September 8, 2010, the opinion issued in the above-entitled case on August 25, 2010, is hereby **AMENDED** as follows:

Page 15, line 16, the following sentence is added to the beginning of the paragraph: "In other words, while the Illinois court erred in finding that DiGrazia's presence militated in favor of voluntariness, this lone error is not of such magnitude as to result in an unreasonable application of Supreme Court precedent under AEDPA. *See Hardaway*, 302 F.3d at 763."

Page 15, lines 16-19, the following sentence is deleted: "In other words, the youth officer does not, and should not, play the role of a lawyer to the minor. The officer's presence is more than what is required by law to safeguard against any abuse of process or coercion."

Page 15, lines 21-22, the following phrase is deleted: "and was incorrect in concluding that the state appellate court unreasonably weighed its impact"

Page 17, line 16, the following sentence is added to the beginning of the paragraph: "The

Illinois Appellate Court considered the appropriate factors in coming to its voluntariness determination and, although it erred in one respect, it did not unreasonably apply Supreme Court precedent. *See Hardaway,* 302 F.3d at 763."

Page 17, line 16, the following sentences are deleted: "The Illinois Appellate Court did not fail to consider relevant material factors or grossly miscalculate the balance. Therefore, in light of the fact that Etherly was read his rights several times and understood them, was questioned for a very limited period of time, and was not coerced, we conclude that the Illinois Appellate Court's determination that Etherly's statement was voluntary under the totality of the circumstances did not fall well outside the boundaries of permissible differences of opinion. It therefore was not objectively unreasonable."

No judge in active service has requested a vote on the petition for rehearing en banc and the judges on the panel have voted to deny rehearing. It is, therefore, ORDERED that rehearing and rehearing en banc are **DENIED**.